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**A MANUAL OF INTERNATIONAL LAW
FOR THE USE OF NAVAL OFFICERS**

A MANUAL OF INTERNATIONAL LAW

FOR THE USE OF
NAVAL OFFICERS

BY

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A Naval War Code"*

(REVISED EDITION)

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PREFACE.

In preparing this book as a manual for officers of the United States Navy, I have not aimed at any undue originality; but rather to present matter than can be considered sound and authoritative. For that reason I have drawn largely from the Digest of International Law by Prof. J. B. Moore, a mine of information as to the accepted and historical policy of our government. The works of Dr. Thos. J. Lawrence and Prof. Oppenheim have been quoted very largely as the best and most recent treatises in English representing the European point of view upon matters of international law.

My study of international law, begun at the United States Naval Academy and continued during mature years at the Naval War College, convinces me that to no service of the government is a knowledge of international law more valuable than to that of the navy. I might also add that, so far as my experience goes, there is no naval service whose members are more familiar with the tenets of the laws of nations than our own.

CHARLES H. STOCKTON,
Rear-Admiral U. S. Navy, Retired.

THE GEORGE WASHINGTON UNIVERSITY,
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NOTE TO REVISED EDITION.

Advantage has been taken of the printing of a new edition of this book to revise it to a limited extent. A supplementary chapter, an index and some additional papers in the appendix have been added to the text.

C. H. S.

FEBRUARY 1, 1917.

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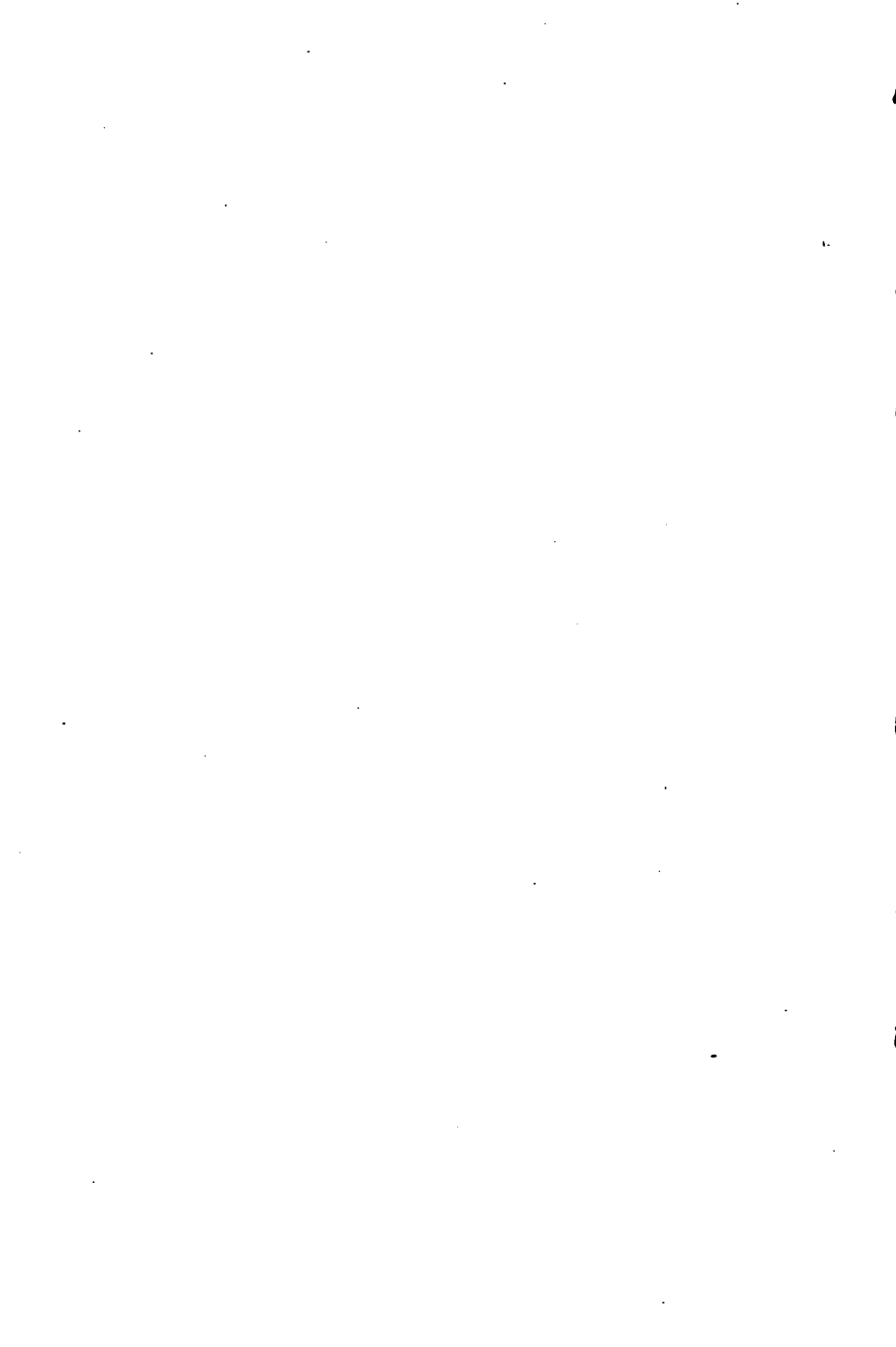
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PART I.
INTRODUCTORY.



CHAPTER I.

THE NATURE AND SCOPE OF INTERNATIONAL LAW.—MARITIME CODES.—RECENT PROGRESS IN CODIFICATION.—OBSERVANCE OF INTERNATIONAL LAW.

1. Definition of international law.—International law, as commonly understood, is that body of rules which prescribes the rights and duties of states in their mutual relations, and which governs generally the actions of modern civilized states in their intercourse with one another.

These rules are the results of customs and precedents arising from the intercourse of states, of various international agreements, and of the acts of states which have in the lapse of time been recognized as a general authority by the various civilized nations of the world. These rules may justly be considered as based upon the moral convictions and the wise experience of enlightened mankind.

2. International law compared with municipal law.—International law differs from national or municipal law, especially from that which is written law, in that it has primarily states instead of persons for its subjects, that it does not proceed from any superior law-making power, and that there is no sovereign authority whose function it is to enforce the law in the case of neglect or violation.

Its existence is, however, accepted by all civilized states as a ruling force between them, and it has never been officially suspended by them in time of peace or of war. A recognition of its obligations is incorporated in the municipal law of many states, the Constitution of the United States of America, for

instance, investing Congress with the power to define and punish offenses against the law of nations.¹

3. Origin of international law.—Professor Moore, in his Digest of International Law, says,² “There is no precise time at which it may be said that the body of rules which regulate, under the title of international law, the intercourse of nations, came into being. As a science it assumed a definite form in the sixteenth and seventeenth centuries, in the works of the great philosophical jurists, of whom Grotius is the most illustrious. These works are distinguished by the blending of moral principles as discovered by reason and revelation with positive law and custom as found in the jurisprudence of nations and their practices. The first constituted what was called the law of nature (*jus naturæ*); the second the law of nations (*jus gentium*). Hence the title of some of the treatises—the Law of Nature and of Nations. Of the positive element of the new science the Roman civil law was the chief source, since it was the foundation of the jurisprudence of the countries of continental Europe, whose laws and practices were chiefly consulted.”

4. The term “international law.”—“It is thus apparent that from the beginning the science in question denoted something more than the positive legislation of independent states, and the term, ‘international law,’ which has in recent times so generally superseded the earlier titles, serves to emphasize this fact. It denotes a body of obligations which is, in a sense, independent of and superior to such legislation. The government of the United States has on various occasions announced the principle that international law, as a system, is binding upon nations, not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental

¹ Const. of U. S., Sec. 8, Art. 1.

² Moore's Digest, Vol. 1 (2), pp. 1-2.

condition of their admission to full and equal participation in the intercourse of civilized states.”

5. Authorities in international law.—“Though on many subjects the rules of international law are clear and precise, yet, as often happens with municipal law, the rule applicable to a particular case may be uncertain and difficult of ascertainment. In such cases an appeal is made to the authority of writers; to the provision of treaties disclosing a consensus of opinion; to the laws and decrees of individual states regulating international conduct; to the decisions of international tribunals, such as boards of arbitration; and to the judgments of prize courts, and of ordinary municipal courts, purporting to be declaratory of the law of nations.”

6. Maritime codes.—As a matter of especial interest to naval officers and sea-faring men are the various codes and collections of sea laws existing before the time of Grotius, which were factors in the early development of international law and of our present maritime municipal laws. Speaking of these, Oppenheim says,* “From the eighth century the world trade, which had totally disappeared in consequence of the downfall of the Norman Empire and the destruction of the old civilization during the period of the migration of the peoples, began slowly to develop again. The sea trade specially flourished and fostered the growth of rules and customs of maritime law which were collected into codes and gained some kind of international recognition. The more important of these collections are the following: ‘The Consulate del Mare,’ a private collection made at Barcelona in Spain in the middle of the fourteenth century; ‘The Laws of Oleron,’ a collection, made in the twelfth century, of decisions given by the maritime court of Oleron in France; the ‘Rhodian Laws,’ a very old collection of maritime laws

* Oppenheim, Vol. 1, pp. 55-56.

which partly date back as far as the eighth century; the 'Tabula Amalfitana,' the maritime laws of the town of Amalfi in Italy, which date, at latest, from the tenth century; the 'Leges Wisbuensis,' a collection of maritime laws of Wisby on the island of Gothland, in Sweden, dating from the fourteenth century."

7. Codification of international law.—A movement towards bringing international law into a similar condition, in some respects, as national or municipal law is progressing by means of partial codifications of international law. It is true that these are fragmentary and varying as to definiteness in statement, but it is best that the progress should be in that manner. It allows more time for deliberation and amendment in the formative process, and bases codification upon international agreements, upon established uses and upon the general consensus of expert opinion. The uncoded law, like the *lex non scripta* or common law of municipal law, then remains so far as determined authoritative and in force.

8. Recent progress in codification.—Codification of international law is a matter of recent times, and can be found in various individual efforts, national codes, agreements like the Declarations of Paris and St. Petersburg, and also the results of the Geneva Conventions for the amelioration of warfare, The Hague Conferences, and the International Naval Conference of London.

9. Observance of international law.—Finally, as to the matter of the observance of international law by its subjects—the civilized countries of the world—it must be stated here that international law cannot be restricted to any group of civilized nations, formed geographically or politically. It is not even limited to Christian communities, the moment a nation attains and exhibits sufficient civilization and independence she enters into the body of states to whom international law applies. Concerning the observance of this law

by states, I can do no better than quote from Lawrence's *Principles of International Law* as to this matter.⁴

"The governments of all states, whether civilized or barbarous, are compelled to exert activity, not merely in conducting their internal affairs, but also in regulating their conduct towards governments and peoples of other states. Even where a state adopts a self-sufficient theory of national life, and endeavors, as China did till quite recent times, to keep its people from all intercourse with foreigners, it does not escape from the necessity of dealing with them. It cannot act as if it were alone in the world, for the simple reason that it is not alone. The whole machinery of non-intercourse is created with a view to other states, and absorbs in its working no small care and attention of the government. If, then, external affairs have from the necessity of the case to be dealt with by states which have adopted a policy of the most rigorous isolation, it is clear that the vast majority of peoples, who desire a greater or less amount of intercourse with their neighbors, impose thereby upon their rulers the task of dealing to a very large extent with foreign nations. The co-existence of states in proximity to one another renders it necessary for them to pay some sort of regard to each other; and the more civilized the states the more intimate the intercourse. Civilization not only provides men with many interests in common, but also tends to remove man's suspicion of his brother man. Commerce, intermarriage, scientific discovery, community of religion, harmony in political ideas, mutual admiration as regards achievements in art and literature, identity of interests or even of passions and prejudices—all these, and countless other causes, tend to knit states together in a social bond somewhat analogous to the bond be-

Principles of International Law, T. J. Lawrence, pp. 3 and 4, 3d edn.

tween the individual man and his fellows. But just as men could not live together in a society without laws and customs to regulate their actions, so states could not have mutual intercourse without rules to regulate their conduct. The body of such rules is called international law. We do not say that it is invariably observed. Like other law it is sometimes disregarded by those who are supposed to submit to it; and owing to the absence of coercive force to compel nations to obedience, it is more liable to be violated than are the laws laid down by the sovereign power in a state for the guidance of its subjects. But all statements to the contrary notwithstanding, it is generally observed."

10. Navy regulations as to observance of the law of nations.—

It may be well here to call attention to the following articles of the Regulations for the Government of the Navy of the United States (1913) which read as follows:

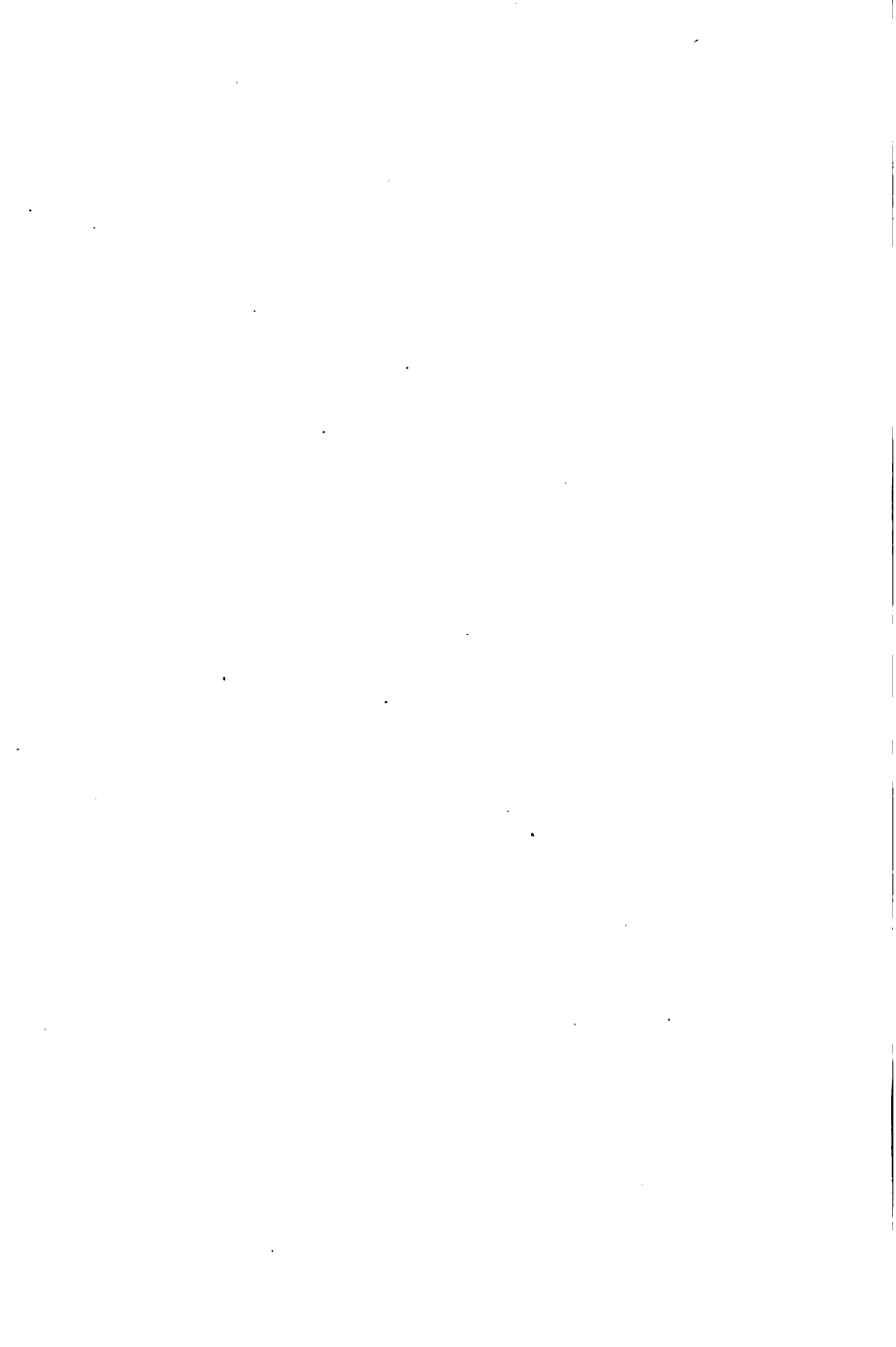
1502. All officers in their relation with foreign States, and with the governments or agents thereof, shall observe and obey the law of nations.

1646. On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, he (the commander-in-chief) shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.

11. Force of usage and custom.—In closing this introductory chapter it is well to emphasize the importance of custom and international usage as a ruling matter in and also a source of the determination of international law. When rules apparently sound conflict in findings, then usage, prevailing usage, determines the rules to be followed.

A distinguished American jurist expresses himself somewhat similarly in treating of law in general. He says, "The final conclusion of the inquiry, what rule or rules in point of fact governed human conduct, was that, so far as social conduct is concerned, *custom* is not simply *one* of the *sources* of law from which selections may be made and converted into law by the independent and arbitrary *fiat* of a legislature or a court, but that law, with the narrow exception of legislation, *is* custom, and like custom, self-existing and irrepealable."⁵

⁵ James C. Carter, "Law: its Origin, Growth and Function," p. 173.



PART II.

PEACE.

CHAPTER II.

SOVEREIGN STATES.—THEIR ATTRIBUTES AND FORMATION.—
OTHER STATES AND COMMUNITIES AFFECTED BY INTER-
NATIONAL LAW.—DE FACTO GOVERNMENTS.—INSUR-
GENCY AND BELLIGERENCY.

12. Definition of a sovereign State.—A sovereign state may be defined in general terms to be a community of persons organized into a body politic and exercising the rights of self-government.

13 Sovereign States.—The subjects of international law.—Others affected thereby.—Sovereign states are primarily and to a full extent the subjects of international law. Part-sovereign States, communities, corporations, and individuals are, however, affected by the rules of international law and according to the circumstances, are more or less governed by them.

14. Conditions of sovereign States.—A sovereign state to be in full standing as such must have the following characteristics and conditions:

First.—There must be a normal political community of persons with common laws, customs and habits.

Second.—There must be a fixed territory within which these persons permanently live.

Third.—There must be a supreme government controlling all persons and things within the boundaries, and capable of entering into full relations with other states and of making offensive and defensive war and peace.

Fourth.—The state must be independent of all other states.

Fifth.—The state must be recognized as a sovereign state by the other sovereign states of the world. It is no longer

necessary, as previously stated, for a state to be a Christian state to be entitled to the status of a sovereign state. Turkey and Japan, for instance, are recognized now as sovereign states. A certain elevated standard of civilization is required by the community of sovereign states before entry can be made into that community by another state. This standard has not yet been attained by such countries as China, Persia or Siam.

As to other matters Phillimore says, "It is a sound general principle, and one to be laid down at the threshold of the science of which we are treating, that international law has no concern with the form, character or power of the constitution or government of a state; with the religion of its inhabitants, the extent of its domain, or the importance of its position and influence in the commonwealth of nations."¹

15. Equality of sovereign States in a legal sense.—Legally, then, all sovereign states within the purview of international law are equal, that is, equal in their rights and in their obligations, equal in their sovereignty and in their independence. It does not follow, of course, that this equality extends to their political influence. The status of the great maritime powers in the world, or of the great powers of Europe upon that continent, or even of the United States of America in American affairs, can be recognized at once as an evidence of political inequality.

16. Colonial possessions.—Vattel, with respect to colonial possessions and dependencies, says, "Whenever the political laws and the treaties have not established distinctions to the contrary, that which we call the territory of a nation includes its colonies."

17. Loss of sovereignty.—"The sovereignty of a state may be lost in various ways. It may be vanquished by a foreign

¹ Phillimore, *Int. Law.*, 3d edn., Vol. 1, p. 81.

power and become incorporated into the conquering state as a province or as one of its component parts, or it may voluntarily unite itself with another in such a way that its independent existence as a state will entirely cease. Again, two sovereign states may become incorporated into one, so as to form a new sovereign state in place of the other two whose independent existence as states is entirely destroyed by such incorporation."

"Thus the incorporation of the Seven United Provinces and the Austrian Low Countries, by the treaties of Vienna, under the Prince of Orange, as King of the Netherlands, was the union of two distinct sovereignties forming a new sovereign state. By the incorporation of Wales, Scotland and Ireland into Great Britain, and of Normandy and Brittany into France, these incorporated states lost their existence as distinct and substantive political bodies."²

18. Recognition of new States.—Cushman K. Davis, in his treatise on International Law, says, "States come into being by conquest, by colonization, by insurrection and by peaceful change of old governments into new forms or by consolidations of several governments into one. When they attain a firm consistency, and an apparent perpetuity is established, they become proper subjects of recognition as states by other governments."³

19. Modes of recognition of States.—The method of recognition of a new state is varying; it may be by formal declaration, by proclamation, or by treaty. It may also be implied by the sending or receiving of ambassadors or other state agents and giving exequaturs to its consuls. It may first be done by the recognition and salute to the flag of the new state, as France did at Quiberon, with respect to the American flag."⁴

² Halleck, ed. by Sir S. Baker, Vol. 1, p. 95.

³ Davis, C. K., *Int. Law*, pp. 109-110. ⁴ Cf. page 37.

Recognition may be collective by states, as in the case of Belgium, in 1831; of Greece, in 1832; of Roumania, Servia and Montenegro by the Berlin Congress of 1878; of the State of Congo by the Berlin Conference of 1885; and of late years of Bulgaria by the interested powers in 1908.

20. Neutralized States.—A state is not a sovereign state so far as international law is concerned if there are any limitations upon its power to enter into relations with other states. There are certain states coming under this head known as *Neutralized States*. These states are permanently neutralized by a treaty among the interested states or the Great Powers. They are required to abstain from war, except when they are attacked or their existence or territory threatened. Their immunity from attack is guaranteed by the interested states, which are generally neighbors. Switzerland, Belgium and the Grand Duchy of Luxembourg occupy a position of guaranteed and permanent neutrality, provided that they avoid all beligerent operations save such as are necessary to protect themselves from attack.

Lawrence⁴ describes the history of this neutralization as follows: "After the final overthrow of Napoleon a declaration was signed at Paris on November 20, 1815 by the representatives of Great Britain, Austria, France, Prussia and Russia, whereby they formally recognized the perpetual neutrality of Switzerland and guaranteed the inviolability of its territory within the limits established by the Congress of Vienna. The agreement of the five great powers was held sufficient to elevate the neutralization of Switzerland into a principle of the public law of Europe and its sanctity is none the less real because the Swiss people have shown themselves resolved to defend the integrity of their frontiers by well-armed and admirably organized battalions of hardy mountaineers. No

⁴ Lawrence's Principles of Int. Law, p. 487, 3d edn.

case of violation of their territory has occurred since 1815. The political advantages of its isolation from warlike operations are so manifest that none of the neighboring states is likely to venture upon invasion with the certainty before it of encountering a desperate resistance from the inhabitants and bringing about the armed intervention of some of the guaranteeing powers."

The Belgians, who had been united with Holland by the Congress of Vienna, rose in revolt against the ruling house in 1830. They did not come to terms until 1839, their arrangements being confirmed by the five great powers in another treaty of the same date which guaranteed the independence and neutrality of Belgium and required it to abstain from any interference in the armed struggles of other nations. This has been complied with up to the present time.

In May, 1867, the Grand Duchy of Luxembourg was likewise placed in the condition of neutralized territory of a permanent nature by the guarantee of the European powers. Belgium took part in the proceedings and acted in union with the other powers, but did not sign the treaty which contained the guarantee of the neutrality of Luxembourg, which guarantee might, of course, have required warlike action from Belgium not consistent with her own neutralized condition. Luxembourg has no armed forces except police.

21. Part- or semi-sovereign States.—A state which retains a certain unity or individuality in international law, but is subject to the authority or direction of another state in its foreign intercourse, is known as a part-sovereign or semi-sovereign state. "The paramount state," Moore says, "is called the suzerain, and its relation to the subject state is called suzerainty. The extent of the authority or subordination comprehended by this term is not determined by general rules, but by the facts of the particular case. The foreign relations of a subject state may be wholly and directly con-

ducted through the ministry of foreign affairs of the suzerain. It may, on the other hand, maintain diplomatic relations and, subject to the veto of the suzerain, conclude treaties of all kinds; but, more frequently, its right of initiative, if it possesses any, is confined to a limited sphere."

22. Cuba.—With respect to the relations existing between the Republic of Cuba and the United States, it may be well to give the pertinent articles of what was known as the "Platt Amendment to the Army Appropriation Act of March 2, 1901." These articles, with the others contained in the amendment, were incorporated into an ordinance appended to the Cuban Constitution. They were also embodied in a permanent treaty between the United States and the Republic of Cuba, signed at Havana May 22, 1903, the ratifications of which were exchanged at Washington, July 1, 1904.⁵

I. That the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power to obtain by colonization or for military or naval purposes or otherwise, lodgement in or control over any portion of said island.

* * * * *

III. That the Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.

* * * * *

⁵ Moore's Digest of Int. Law, Vol. 6, pp. 237-238.

VII. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

By a treaty concluded July 2, 1903, certain areas at Guantanamo, on the south side of Cuba, and Bahia Honda, on the north side of the island, were leased to the United States by Cuba for naval stations.^{5a}

23. Panama.—The Republic of Panama was recognized by the United States November 13, 1903. On November 18, 1903, a treaty was concluded between the United States and Panama which, after ratification, was proclaimed on February 26, 1904. The first article of this treaty contains a guarantee by the United States of the independence of the Republic of Panama. The second article contains a grant on the part of Panama to the United States in perpetuity of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of a ship canal. In other articles a canal and railroad monopoly is granted to the United States across the isthmus, also the right to use its land and naval forces and to establish fortifications for the safety or protection of the canal, and, finally, Panama expresses its willingness to sell or lease lands suitable for naval stations on either coast.⁶

24 Protectorate and protected States.—It is difficult to discriminate between vassal and protected states or protectorates in the sense of states existing under such relations. "As they are for certain purposes," as Halleck says, "and under certain limitations to be dealt with independently of such protectors, it is necessary to regard them as distinct organiza-

^{5a} Modified in 1912 by surrendering Bahia Honda and enlarging area at Guantanamo.

⁶ A compilation of Treaties of U. S. in Force, 1904, p. 609.

tions." The position of such states cannot be well classified or defined, as their positions depend upon the treaty or agreement of protectorate, which enumerates the rights and duties of the two States concerned. Probably Egypt, Tunis, Zanzibar and the little republics of Andorra and San Marino in Europe, best represent this type.

25. Corporations, chartered companies.—The corporations and chartered companies existing under English and German rule form also quasi-nationalities. They were represented in the past by the East India Company, and in the present by the German East Africa Company, the Royal Borneo Company and the British South Africa Company. These corporations, though possessing the sovereign powers with respect to native princes and people, act in subordination to the supreme power of the British and German Empires, and are represented by their respective states in all their relations with foreign sovereign states. Lawrence, speaking of a British corporation as a type, "Like Janus of old, it has two faces. On that which looks towards the native tribes all the lineaments and attributes of sovereignty are majestically outlined. On that which is turned towards the United Kingdom is written subordination and submission."

26. Savages and communities not fully civilized.—"Communities not fully civilized, even if barbarous, are entitled to be treated with due respect for their natural rights. Unduly severe measures should not be resorted to, and international law, so far as it is in accordance with principles of justice, truth and humanity, is equally binding in every age and upon all mankind, laws ought to be respected in all cases, in absence of any convention, or of any usages."⁷

27. Individuals as subjects of international law.—The last class of subjects affected by international law are individuals.

⁷ Abdy's Kent, p. 8.

Individuals may in time of war, without the sanction of their state, or in spite of its injunctions, commit acts which bring them within the rules of international law and in a state of violation of the laws of blockade, of the carriage of contraband or of unneutral service by which they suffer capture and condemnation of their ships and cargoes. They may, as individuals, fire upon a belligerent force or upon an individual from a private house and be liable to be executed as an irregular combatant violating the laws of war. They may in time of peace become pirates and thus become liable to capture, trial and execution for their acts by the tribunal of any state in accordance with the tenets of international law. As a rule, states themselves deal with their own individuals, but in the exceptional cases mentioned above they can deal in war or peace according to the circumstances with individuals of another state.

28. Distinction between State and Government.—"Although in speaking of the state, we commonly think of the organization called the government, yet the two ideas are separable. While it is true that a new state is not recognized till a government has been established in it capable of performing international obligations, yet it is also true that, after such recognition has once been given, the state may continue to exist, and its existence may continue to be acknowledged, even though the government may have been overthrown by an alien invader or destroyed by domestic factions, so that for the time being there is no organization that can be treated as the repository of the national power."*

29. De facto Governments.—A *de facto* government or belligerent community is a political organization, arising during a civil war or rebellion, which has established itself by hostilities or otherwise to such an extent that it can exercise sovereign powers and be entitled to all of the rights of war

* Moore's Digest, Vol. 1, p. 40.

and commercial intercourse. *De facto* governments are of two classes, one class attains power after it has expelled the regularly constituted authorities from the seat of government or power and from the public offices, and establishes its own functionaries in their places, so as to acquire and represent the sovereignty of the nation. The other class of *de facto* governments is represented where a portion of the inhabitants of a country has separated itself from the parent state and established an independent government of its own. As governments *de facto* and not *de jure* they have not all the rights of a sovereign and independent state, but they may be entitled to recognition as a belligerent community or power. If they are so recognized they are treated to an extent as though they were subjects of international law. Uncertainty as to their permanence prevents their recognition as having free statehood. "But meanwhile," as Lawrence says, "they are levying armies, equipping cruisers if the contest is maritime, and carrying on war in a regular and civilized fashion."*

The effect of recognition of belligerency, as it is called, gives these governments the position of independent states so far as the war is concerned only, they can neither negotiate treaties nor regularly accredit diplomatic ministers. If successful in maintaining their position these communities in due time will be accorded a recognition of independence by the other states.

"It is a customary rule of the law of nations that any state can recognize insurgents as a belligerent power, provided that (1) they are in possession of a certain part of the territory of the legitimate government; (2) they have set up a government of their own; and (3) they conduct their armed contention with the legitimate government according to the laws and usages of war."¹⁰

* Lawrence's Principles, p. 78, 3d edn.

¹⁰ Oppenheim, Vol. 2, pp. 86.

30. Insurgency and belligerency.—In a forcible separation and formation of a new state there are usually, but not necessarily, two antecedent stages through which the new community passes before arriving at its successful independence. The first or preliminary stage is now named *insurgency*, and takes place immediately after the appeal to arms; the second is when the insurrection has established itself with sufficient stability and strength to have conceded the state of *belligerency* or the rights of belligerents.

In some cases the insurrection may not get beyond the first stage, that of insurgency, as in the Brazilian insurrection of 1894, or it may reach the second stage—belligerency—and get no further, as with the Confederate States in our Civil War of 1861-1865, or it may gain its end as insurgents, never having been recognized as belligerents, as in the case of the Chilean insurgents in 1891.

31. Insurgents on the high seas.—Although the right of insurgents to carry on hostilities on land within the territory of the parent state has never been denied, their appearance upon the high seas, coastal waters and sea-ports of their own country has led to an anomalous condition under the tenets of international law. As they were in the service and flying the flag of a government not recognized by the various states of the world, their position upon the high seas has been classed as akin to piracy. Even in comparatively recent decisions of courts they have been referred to as pirates when upon the high seas.

The impropriety of this reference is not only illogical but, as Hall very pointedly observes,¹¹ "It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an ex-

¹¹ Hall, 6th ed., by Atley, p. 255.

ternal recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends."

The executive department of the Government of the United States, and those of several other countries, have decided previously to the judicial decisions above referred to in another way in the following cases.

1. In 1873.—The Spanish ships of war in Cartagena harbor, Spain, fell into the hands of insurgents whom the Madrid Government at once proclaimed as pirates; but the British, French and German Governments instructed their naval commanders that they were not to be interfered with so long as the lives or property of their subjects were not affected.

2. In 1877.—The steamer *Montezuma*, a Spanish vessel, was seized by Cuban insurgents, and under the new name of the *Céspedes* was sent to attack Spanish merchantmen in the Rio Plata. The Government of Spain requested Brazil to treat her as a pirate if she entered Brazilian ports. Brazil refused to do this on the ground that the steamer did not fulfil the definition of a pirate, and furthermore confined her hostilities exclusively against Spain.

3. In 1891.—The Congressional party of Chile seized the major portion of the Chilean navy, which was allowed freedom of operations by the various foreign naval forces in the waters thereabouts, excepting blockade against foreign vessels. The seizure of contraband in neutral vessels was, however, submitted to or rather acquiesced in.

4. In 1893-'94.—The greater part of the Brazilian fleet was in revolution. Admiral Benham, in command of the

United States naval force upon that station, took the ground that during the hostilities in Rio Harbor any American vessels that moved about the harbor did so at their own risk, but that during their loading and unloading they were to be protected. No blockade was allowed or acknowledged. The landing of contraband or military supplies to the enemy could be stopped by the insurgents. Practically the insurgents had the right to carry on hostilities afloat as well as ashore, except where neutrals were affected, i. e., blockade, rights of visit and search and a recognition in neutral ports. In their own waters, but not upon the high seas, they seemed to have exercised the right of seizing contraband as a right of hostilities.

32. The Three Friends case.—The Supreme Court of the United States in the Three Friends case in 1897, during the Cuban insurrection previous to the Spanish-American hostilities, said, "The distinction between recognition of belligerency and recognition of a condition of political revolt between recognition of the existence of war in the material sense, and of war in a legal sense, is sharply illustrated by the case before us. For here the political department (the executive) has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred. . . . We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgement of the insurgents as belligerents by the political department has not taken place, and it cannot be doubted that, this being so, the act in question (the neutrality statute) is applicable."

Secretary of State, John Hay, in 1899, in response to letters from the minister accredited to Bolivia during an in-

surrection, gave the following instructions, which are applicable to naval officers in similar circumstances:

"You will understand that you can have no diplomatic relations with the insurgents implying their recognition by the United States as the legitimate government of Bolivia, but that short of such recognition, you are entitled to deal with them as the responsible parties in local possession, to the extent of demanding for yourself, and for all Americans within reach of insurgent authority within the territory controlled by them fullest protection for life and property."¹²

33. Effect of recognition of belligerency.—Dana says as to the recognition of belligerency that "it is certain that the state of things between the parent state and insurgents must amount, *in fact*, to a *war*, in the sense of international law—that is, powers and rights of war must be in actual exercise; otherwise the recognition is falsified, for the recognition is a fact. . . . The recognition of belligerent rights is not solely to the advantage of the insurgents. *They* gain the great advantage of a recognized status and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a quasi-political recognition. On the other hand, the parent government is relieved from responsibility for acts done in insurgent territory; its blockade of its own ports is respected; and it acquires a right to exert against neutral commerce all the powers of a party to a maritime war."¹³

¹² Moore's Digest, Vol. 1, p. 243.

¹³ Moore's Digest, Vol. 1, pp. 166, 167-168. See also Lawrence's Principles, 4th edn., p. 354.

34. Recognition of States.—As to the next step, the recognition of the new state, it must be noted that between the recognition of belligerency given to those in revolt against the parent state and their recognition as a new state, there is, as Oppenheim says, “a broad and deep gulf.” The exact time of such recognition of independence as a new state is most important. An untimely recognition of a new state is a “violation of the dignity of the mother state, to which the latter need not patiently submit.”¹⁴ Thus the recognition of the United States by France in 1778 was precipitate and led to war with Great Britain. But when, in 1782, Great Britain herself recognized the independence of the United States other states could accord recognition, too, without giving offence to England.

The United States recognized the Spanish colonies, which had declared their independence in 1814, only in 1822, and England only in 1824 and 1825.

¹⁴ Oppenheim, Vol. 1, p. 112.

CHAPTER III.

FUNDAMENTAL RIGHTS AND DUTIES OF STATES.—TERRITORIAL PROPERTY OF A STATE.—TERRITORIAL JURISDICTION OF A STATE.—IMMUNITIES.—SERVITUDES.

35. Fundamental rights and duties of a sovereign State.—

There are certain rights and duties which are inherent to a sovereign state; to a less degrees these exist in states not fully sovereign. They are:

1. The right of independence.
2. The right of legal equality—among other states.
3. The right to hold and acquire property.
4. The right of absolute and exclusive jurisdiction over its own territory.
5. The right of self-preservation.

The duties that correspond to these fundamental rights are those of good faith, of affording redress for wrongs; of due regard for the dignity and equality of other states, and of general and international good-will and courtesy.

36. Independence and legal equality.—The first fundamental right, that of independence, is essential to the creation and existence of a sovereign state. It has been sufficiently discussed elsewhere, as well as the modifications made in this essential by states less than sovereign. The same may be said as to the legal equality of sovereign states.

37. The right to hold property.—A state, like a private corporation, is in law also a legal person, and in its corporate capacity may have absolute ownership of property just as an individual in the state has ownership in his property. Thus, arsenals, navy yards, public buildings, public lands, etc., are

owned by the state, and in some cases railways, telegraphs, canals and public works are also the property of the state.

This species of property, so long as it is within the boundaries of the state, plays no part in international law, but when found in a foreign state it is not subject to the jurisdiction of the owning state, excepting that kind of property which enjoys certain immunity generally known as extritoriality. Ships of war and the residences of ambassadors are instances of this kind. Indeed, other kind of property of the state, such as public vessels not armed, munitions of war, etc., when found within foreign territory have been held to be free from the ordinary process of law.¹

38. Succession in case of unsuccessful insurrection.—Upon the suppression of an insurrection or rebellion the legitimate and titular government is entitled naturally and of right to all moneys and goods which were previously public property of the titular government, this right being in no way affected by the seizure of the property by the insurrectionary government.²

In the case, however, of property acquired by an insurrectionary government during its supremacy, and which government is displaced by the legitimate government, the latter becomes entitled to this property held as public property in the hands of the displaced government by the right of succession. Hence, at the close of the Civil War, the Confederate cruiser "Shenandoah" was delivered up to the United States consul in Liverpool by the British Government, and the Confederate ram "Stonewall" was delivered to the United States Government by the Captain-General of Cuba in Havana harbor, with the approval of the Government of Spain.

39. As to property of a parent State in a new State.—When a

¹ Snow's Manual, ed. by Stockton, pp. 14-15.

² U. S. *vs.* McRea, 1869, Vol. 1. p. 65. Moore's Digest.

new state, however, is formed by a separation from a state already existing, property formerly owned by the parent state in the form of land, buildings, collections of artistic or scientific objects, endowments, etc., lying within the boundaries of the new state, naturally belongs to the latter state.

40. The national domain.—"The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and when such area abuts upon the sea, together with a certain margin of water."^a

41. Jurisdiction of a State over all persons and things within its territory.—The fourth fundamental right of a sovereign state is that it has absolute and exclusive jurisdiction over its own territory; this means first of all over all persons and things within its territory. There are a few exceptions which will be referred to later. The persons who normally come within the jurisdiction of the state are natural-born citizens or subjects and naturalized citizens or subjects; in addition to these are domiciled aliens and travellers passing through the territory of the state.

42. Jurisdiction of the State over all its ships on the high seas.—A state has jurisdiction over all its public ships on the high seas. "For no purpose," says Lawrence, "can the complete jurisdiction of a state over its public vessels on the high seas be over-riden or qualified by any exercise of authority on the part of another state. Even the right of search does not apply to them; and while the merchant vessels of neutrals must submit to be overhauled by the cruisers of both bel-

^a Hall, 6th edn. (Atley), p. 101. Property can be acquired by the state by treaty or by conquest confirmed by treaty.

ligerents, their men-of-war are as free from molestation as they would be in time of profound peace. . . . With regard to merchant vessels on the high seas, international law lays down that each state exercises jurisdiction over its own, and possesses no authority over those of other nations, except that in time of war its cruisers may search them and capture any whose proceedings justify seizure under the laws which regulate the conduct of neutrals. Jurisdiction over the vessels involves jurisdiction over all persons and things on board, including foreigners, whether seamen or passengers.”⁴

43. Jurisdiction of the State over its citizens abroad.—A state has limited jurisdiction over such of its citizens or subjects as are in foreign countries. This jurisdiction cannot be put into operation unless the persons referred to come within the jurisdiction of the state to which they belong. Crimes committed by citizens on board foreign vessels are in the same circumstances as crimes committed on foreign territory. Political offenses against the home country, of course, cannot be punished by foreign states, though ordinary crimes within their own jurisdiction by foreigners are under their jurisdiction and within their rights of punishment.

44. Jurisdiction of a State over domiciled aliens.—By domiciled aliens we mean foreigners who have not relinquished their allegiance to a foreign state, and are consequently not citizens or subjects of the country of which they are residents. They have, however, made their home in the country of their residence with no definite intention of return. This residence, then, according to international law, becomes their domicile and they are termed domiciled aliens.

“To acquire domicile in a place,” says Moore, “there must be (1) residence, and (2) an intention to remain permanently or indefinitely. Where the physical facts as to residence are

⁴ Lawrence's Principles, pp. 205, 206, 3d edn.

not disputed, the sole question is that of intention.”^{*} The jurisdiction which a state has over its domiciled aliens may be called civil in contradistinction to political jurisdiction. Moore also says, “As the test of civil status, domicile directly affects a person’s civil rights and obligations, in respect of personal capacity, legitimacy, intestacy and various other matters. It may also materially affect the extent of his liabilities, as in matters of taxation; for, while all persons within the jurisdiction of a state owe obedience to its laws, those who live continuously under their protection may, by so doing, reciprocally acquire rights and incur obligations more extensive than pertain to merely transient persons. . . . In only one particular is domicile generally admitted to determine national character, and that is in matters of prize, where, the object being to strike at the enemy’s resources, all persons settled in the enemy’s country are held to be tinctured with his belligerent character, so far as concerns their trade, so that their property may be captured on the high seas as enemy property.”^{*} This will be referred to later.

Of course, where citizens or subjects reside more or less permanently in a country where they possess extrterritoriality or freedom from state jurisdiction, as in China, they retain the domicile of their country of allegiance, as they are living to a very great extent under the protection and laws of their own country.

45. Performance of military service by aliens.—Aliens are entitled to the same local or civil protection, with respect to life and property, as citizens or subjects. They are not liable, as a rule, to be incorporated into the military service of the country in which they are domiciled, but they can, if allowed,

^{*} Moore’s Digest, Vol. 3, p. 813.

^{*} Moore’s Digest, Vol. 3, pp. 811-812.

voluntarily enlist in such service.' "They can be called upon for service in the militia or local police to maintain social order, provided the duty is that of a police and not political, and they can be called upon to take arms against an external enemy, if such enemy threatens the existence of social order, as in the case of an attack by savages or uncivilized peoples."*

Aliens are subject to local jurisdiction whether the government under which they live is duly recognized as of a permanent condition or only as one of a *de facto* nature.

46. Exclusion of aliens.—They can, of course, under the right of the sovereignty of the state be either expelled or excluded from the country in which they wish to retain or acquire domicile. This rule has been exercised at various times by the United States, as in the passage of the Alien Act in 1798, and in the various laws providing for the exclusion of foreign paupers and criminals, and for the exclusion of certain classes of Chinese immigrants.

47. Case of Martin Koszta.—A question which may not properly come within the scope of the subject under discussion is as to the status of a person, foreign born, who has declared his intention to become a citizen of the United States, and who has to that extent given up his allegiance to his former country; but who, though having a domicile in the United States, is temporarily outside of its jurisdiction. The celebrated case of Martin Koszta came under this head. Koszta, by birth a Hungarian, and hence an Austrian subject, took an active part in the insurrection of 1848-'49 for the independence of Hungary. At the unsuccessful termination of that movement Koszta escaped to Turkey, which country

* By an Act of Congress of 1863 aliens who have made their declaration of intention to become citizens are subject to military draft, or conscription, but they are given time to leave the country if they choose. See also treaty between U. S. and Italy of 1871.

* Snow, Int. Law, ed. by Stockton, 2d edn., p. 53.

refused to return him to Austria, but expelled him from their territory with the consent of Austria and with the understanding that he should go to foreign parts. Koszta came to the United States and established a domicile in this country. In 1852 he made a declaration of his intention to become a citizen of the United States before the proper tribunal in the usual legal manner. After remaining nearly two years in the United States he proceeded to Smyrna, in Turkish territory, on account, it is stated, of private business of a temporary nature, claiming the rights of a naturalized citizen of the United States, and offering to place himself under the protection of the United States consul at Smyrna; the latter official, after a delay, extended protection to him, giving him a letter of safe conduct, which, under the Turkish laws, they have a right to do. While waiting in Smyrna, as is alleged, for an opportunity to return to the United States, he was seized by some people without any authority, treated harshly, and finally thrown into the sea, from which he was picked up by a boat from the Austrian brig of war—"The Hussar"—taken by force on board that vessel and confined in irons. Application on the part of the American consul and our chargé d'affaires for his release was unsuccessful. The U. S. S. "St. Louis," under the command of Captain Ingraham, arriving in the harbor of Smyrna at this time, representation was duly made to Captain Ingraham concerning the state of affairs. After full investigation of the matter, and after being convinced that it was the intention of the commander of "The Hussar" to convey Koszta to Austrian territory, Ingraham made a demand for his release, intimating that he would resort to force if the demand was not complied with by a certain hour. An arrangement was, however, made by which Koszta was delivered to the French consul-general at Smyrna, there to remain until he should be disposed of by the mutual agreements of the consuls of the respective governments at

that place. Pursuant to that agreement he was released and returned to the United States.

Professor Moore, in the *Digest of International Law*, sums up this case as follows: "The full substance of the correspondence between Mr. Marcy and the Chevalier Hülsemann concerning the Koszta case has been given, and to this have been added other discussions of and comments upon the case by Mr. Marcy himself, and his immediate successors, in order that the misconceptions that have so widely prevailed on the subject may be removed. First of all, it is seen that the supposition that Mr. Marcy held that Koszta's declaration of intention gave him an American character and a claim to the protection of the United States is not only destitute of foundation but is directly opposed to his frequently expressed opinion. He referred to the declaration of intention merely as an evidence of domicile. In the second place, there likewise disappears the supposition that he held that a domiciled alien, even where he had made a declaration of intention, was entitled to the same protection abroad as a citizen of the United States, or yet to protection against the claims of the country of his original allegiance lawfully asserted, either there, or in a third country. In the third place, it appears by Mr. Marcy's instruction to Mr. Marsh, of August 26, 1853, that the claim that Koszta had at the time of his seizure an American character was based, in the first instance, *exclusively* upon his having been duly admitted to American protection, according to the recognized usage in Turkey."

"The links in Mr. Marcy's chain of reasoning were (1) that, as the seizure and rescue of Koszta took place within the jurisdiction of a third power, the respective rights of the United States and Austria, as parties to the controversy that had arisen concerning that transaction, could not be determined by the municipal law of either country, but must be

determined by international law; (2) that, as the previous political connection between Koszta and the Austrian Government had, by reason of the circumstances of his emigration and banishment, been, even under the laws of Austria, dissolved, he could not at the time of his seizure be claimed as an Austrian subject, nor could his seizure as such be justified by Austria, either under international law or her treaties with Turkey; (3) that the seizure in its method and circumstances constituted an outrage so palpable that any bystander would have been justified, on elementary principles of justice and humanity, in interposing to prevent its consummation; (4) that there were, however, special grounds on which the United States might, under international law—that being under the circumstances the only criterion—assert a right to protect Koszta; (5) that, although he had ceased to be a subject of Austria and had not become a citizen of the United States, and therefore could not claim the rights of a citizen under the municipal laws of either country, he might, under international law, derive a national character from domicile; (6) that, even if Koszta was not, by reason of his domicile, invested with the nationality of the United States, he undoubtedly possessed, under the usage prevailing in Turkey, which was recognized and sanctioned by international law, the nationality of the United States, from the moment when he was placed under the protection of the American diplomatic and consular agents, and received from them his *tezkereh*; (7) that, as he was clothed with the nationality of the United States, and as the first aggressive act was committed by procurement of the Austrian functionaries, Austria, if she upheld what was done, became in fact the first aggressor, and was not entitled to an apology for the measures adopted by Captain Ingraham to secure his release; (8) that Captain Ingraham's action was further justified by the information which

he received of a plot to remove Koszta clandestinely, in violation of the amicable arrangement under which he was to be retained at Smyrna while the question of his nationality was pending; (9) and finally, that, as the seizure of Koszta was illegal and unjustifiable, the President could not consent to his delivery to the consul-general of Austria at Smyrna, but expected that measures would be taken to cause him to be restored to the condition he was before he was seized.”*

48. Aliens as travellers passing through territory of a State.—

Aliens may also come under the jurisdiction of a state, even when not domiciled, while they are within its limits as travellers passing through its territory. The range of jurisdiction is, of course, much more limited than when the alien is domiciled with a more or less permanent tenure of stay. They are, of course, subject to the criminal laws of the state and to the laws regarding the contracts which they make in the course of their travels. In no case, however, are the political rights of such travellers affected by their temporary sojourn in a foreign state.

49. A State has jurisdiction over pirates captured by its vessels.—A state has jurisdiction over all pirates seized by its vessels. Piracy is a crime under international law, and as such pirates are outlaws and the enemies of every state, and hence can be arrested by anyone and brought to trial for this offense in any jurisdiction. By the act of piracy the offender and his ship lose not only national character and protection but are placed within the jurisdiction of any state that may through its agent become the captor. By international law the proper punishment is death; but this is not mandatory when any state which by its own law does not award the death penalty. So, too, international law does not require the pur-

* Moore's Digest, Vol. 3, pp. 843, 844, 845.

suit and punishment of pirates as a duty. Germany, for instance, by its commercial code does not permit the punishment of pirates who are foreigners committing piracy against foreign vessels.

50. Jurisdiction over the air above the territory of a State.—

So far it may be said that the territorial possessions of a state consists of land and water. The question, however, has arisen as to the status of the atmosphere above this territory of a state. With the advent and development of wireless telegraphy, aeroplanes, dirigible balloons, etc., the question of the freedom of the air above this territory has arisen. If it should be declared free like the high seas, certain rights of self-protection and defense must be reserved to the states concerned. If the air should be considered, on the other hand, as territorial, the right of innocent passage must be allowed for persons, messages and aerial machines. Naturally, the extent of such aerial jurisdiction will be largely measured by the extent of physical control over the things contained in the atmosphere. A general agreement upon the lines suggested does not seem impracticable.*

51. The claim to jurisdiction over foreigners for offenses committed abroad.—

A number of states in Europe and America, including France, Germany and Austria, punish foreigners who have committed crimes in foreign jurisdiction against the safety of their states. Russia and Italy with others go further and punish offenses against their individual subjects, such as murder, arson and forgery, though committed in a foreign country by persons of foreign nationality. Of course, the offenders cannot be tried and punished unless they come within the territory of the offended state. This claim has been rigorously contested by the United States and is not enforced by Great Britain nor conceded by British writers. Notwithstanding the opposite opinion held by the other nations, the law and practice of the United States is expressed

* See Supplementary Chapter..

by Mr. Justice Story of the Supreme Court of the United States in 1824, in the case of the "Apollon" (9 Wheaton 362), to this effect:

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction, and, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted, in construction, to places and persons upon whom the legislature have authority and jurisdiction."

The case of A. K. Cutting comes under this head. Cutting was arrested and imprisoned in Mexico in 1886 for an alleged offense of libel committed in Texas against a Mexican citizen. The Government of the United States protested vigorously against such action and demanded the release of Cutting, which was granted by the Mexican Government after considerable delay. Although the matter cannot be considered as a settled doctrine of international law, there is no doubt as to the settled policy of the United States, as shown above by the opinion of Mr. Justice Story in 1824, and the executive action taken with respect to Mexico in 1886.

52. Exception to the rules about jurisdiction of a State within its territory.—Immunities of foreign sovereigns.—There are certain exceptions to the general rule of exclusive jurisdiction of a state over all persons and things within its territory. First among those who are entitled to these exceptions or immunities are foreign sovereigns or heads of a state and their suites.

The exemption of a sovereign or head of a state who is naturally in the position of a guest from arrest, detention, civil process or jurisdiction within a foreign territory is an immunity which largely explains itself as a matter of courtesy due to his official importance and dignity. He possesses this immu-

nity while he is in foreign territory in his capacity of a head of a state, and the members of his suite enjoy the same personal immunity as himself. If a sovereign or ruler commits acts against the safety or good order of the state in which he is a guest or visitor, or permits one of his suite to do so, the offended state can request him, or the member of his suite, to leave the limits or, if necessary, to expel him, using only such restraint as will be necessary to accomplish the purpose.¹⁰

The head of a state, however, cannot exercise any jurisdiction of his own within the limits of the state he is visiting even among the members of his suite. If any urgent cases arise in his suite, the persons concerned should be sent home for trial. Should a sovereign ruler travel incognito or lose his official capacity as a head of a state his immunities do not exist; but can be assumed at his pleasure if he retains his position as head of the state. The case of ex-President Castro, of Venezuela, who was removed from his position while travelling in Europe, is an example of a consequent cessation of immunities.

53. Immunities of diplomatic agents and consuls.—A diplomatic representative of a foreign state duly accredited to the state or travelling through the state on his way to or from his post, is entitled to certain immunities from foreign jurisdiction. These immunities, in general, consist of exemption from civil or commercial jurisdiction, from local police regulations, from custom duties and taxes, from religious regulations and from the general exercise of authority over his household. These immunities are extended to the official suite of the representative and to his immediate family.

As Lawrence says, a diplomatic representative, "could not attend to the interests of his country with perfect freedom and absolute fearlessness if he were liable to be dealt with by the

¹⁰ F. Snow, ed. by Stockton, p. 21.

local law and subjected to the authority of the officers of the state to which he was sent.”¹¹

Consuls are not diplomatic agents, and hence do not require or possess the immunities given to such representatives. They have, as a matter of comity, exemption from military service and quartering, and their official papers are exempt from seizure. By convention, however, and especially in Eastern countries, their rights and privileges are duly extended, and international courtesy often supplements the immunities provided by custom and convention. This matter, and a further consideration of diplomatic representatives will be treated further on.

54. Public armed forces of foreign States on land possess immunity from jurisdiction.—It is universally recognized under the rules of international law that a state must obtain permission before its public armed forces can pass through the territory of another country. In the United States it is customary for such permission to be obtained also from the governors of the separate states of the Union which are concerned. While passing through the territory of a foreign state, this compact military force under its own officers, regulations and discipline has immunity from the jurisdiction of the state. Chief Justice Marshall, in the case of the *Schooner Exchange vs. McFadden*, expressed the rule of international law in this case as follows:

“A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it,

¹¹ Lawrence's Principles, p. 274, 3d edn.

the purpose for which the free passage was granted, could be defeated and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.”¹²

55. Ships of war of foreign States possess immunity from the jurisdiction of a State.—“If there be no prohibition the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and remain in them while allowed to remain, under the protection of the government of the place.”¹³

A vessel of war when in a foreign friendly port is ordinarily exempt from the jurisdiction of such port so far as acts beginning and ending on board of that vessel is concerned. This immunity is extended to its boats, tenders, rafts and other appurtenances. The ship must, however, respect the administrative rules of the port, such as to pilotage when used, to places and methods of anchoring, regulations for quarantine and the disposal of refuse, etc., etc.

Lampredi, an able Italian jurist, in referring to the immunity of a vessel of war under such circumstances from the local jurisdiction of a foreign port, says, “Such a ship of war cannot exist and be governed without the perpetual duration of military command, which consequently continues to be exercised in all of its extent within the vessel more in

¹² Scott's Cases, pp. 211, 212.

¹³ Exchange *vs.* McFadden, Scott's Cases, p. 213.

virtue of the concession of the prince who receives the ship than from any right on the part of the captain, much less in virtue of any territorial right."

A vessel of war is exempt from the visitation and search of the officials of the customs of a foreign port. By the regulations of the United States Navy, commanding officers are strictly forbidden to allow any examination whatever of their ships or boats by foreign officers of the customs. They are also forbidden to permit their vessels to be searched by any person representing a foreign state, nor can any of the officers or crew be taken out of her, so long as they have the power to resist. If force is used it is to be repelled."

When a vessel of war is within the jurisdiction of a foreign state, either in port or within the marine league, the commanding officer, of course, retains his usual authority to maintain order and discipline, and to establish the necessary tribunals to punish offenses committed on board or on shore by those under his command in violation of discipline or the laws of the service. It is not legal, however, in the United States Navy to have such courts hold session on shore in foreign territory. In the case, however, of crime committed on board by persons not belonging to the ship or the naval service of his country, the commanding officer may with propriety deliver the parties concerned to the authorities of the port. If the offender and the injured person are both citizens or subjects of the state within which the port is situated it is his duty in ordinary cases to deliver the criminal to the local authorities.

56. As to refugees from the port.—The same principle applies to ordinary criminals seeking to escape the punishment of their crimes by taking refuge on board foreign vessels of war. It is wrong to harbor them; the privilege of refuge is

¹⁴ Par. 2, Art. 2045 and Art. 2046, Navy Reg., 1913.

only for fugitive slaves or persons who are pursued for political offenses alone. The surrender, however, is in all cases at the discretion of the commanding officer. The accused person cannot be taken out of the ship without his order or permission. Under no circumstances have the local authorities the right of seizure or arrest on board of foreign vessels of war. Delivery of the person may be requested, but in case of refusal further proceedings with a view to the return of the offenders must be by means of the usual diplomatic channels.

57. Deserters not to be arrested on shore in foreign jurisdiction.—No officer or man can be allowed to violate the jurisdiction on shore by arresting or attempting to arrest a deserter or straggler from his vessel. If any officer or member of the crew while on shore commits an offense against the laws of the country, the local authorities have jurisdiction over such persons while they are on shore and may cause them to be arrested while there, and to be tried and punished in accordance with the laws of the foreign state. The commanding officer of the vessel or the admiral, if he should be present, should be at once informed of the arrest and the causes which led to it, so that either he or the diplomatic or consular agents of his government may procure the return of the persons accused to their vessel or be enabled to observe the manner of treatment and trial. If an offender, however, escapes to his vessel he cannot be apprehended by the local authorities; but the commanding officer can, if he sees fit, without loss of dignity or prestige, surrender the offender for trial and punishment by the local courts, or the matter can be left to the usual diplomatic channels as mentioned above.

It must not be understood, however, that this doctrine of the immunity of a ship of war goes so far as to deprive a state of all power over the acts of a foreign ship of war. Entrance into the harbors of a state may be denied to any

ship refusing to respect the local laws; her stay may be limited; she may be ordered to depart, and, if necessary, force may be used to expel her, as in the case of a diplomatic agent or even a sovereign. Such expulsion is provided for in Section 5288 of the Revised Statutes of the United States, in which the President is empowered to use for this purpose the land and naval forces of the United States or the militia thereof.¹⁵

Finally, as Hall says, "The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purpose; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew she is merely property; if members of her crew go outside the ship, or her tenders or boats, they are liable in every respect to the territorial jurisdiction. Even the captain is not considered exempt in respect of act not done in his capacity of agent of the state."¹⁶

"In 1871 Rear-Admiral Boggs, U. S. N., commanding the European fleet refused to give up certain persons on board a vessel of his command who were charged by the Italian Government with larceny. Secretary Fish, while observing that any person attached to a foreign man-of-war was liable to arrest on shore for any offense there committed, said: "In the event that a person on board the foreign ship should be charged with a crime, for the commission of which he would be liable to be given up, pursuant to the extradition treaty, the commander of the vessel may give him up if such proof of the charge should be produced as the treaty may require."

¹⁵ F. Snow, ed. by Stockton, p. 24.

¹⁶ Hall, 6th ed., p. 196.

"In such case, however, it would always be advisable to consult the nearest minister of the United States. This was done in this instance and the decision of Mr. Marsh that the persons were not liable to be given up, pursuant to the treaty with Italy, is approved by the department."

58. The case of the Constitution.—January 17, 1879, the U. S. frigate "Constitution" went ashore on the English coast, having on board at the time a cargo of machinery belonging to individuals and intended for the Paris Exhibition. She was pulled off by tugs, the owners of one of which being dissatisfied with the amount of remuneration offered him, brought an action for salvage and applied for warrants for the arrest of the ship and cargo. The court refused to issue the warrant, Sir Robert Phillimore, who rendered the decision, saying that "Ships of war belonging to a nation with whom this country is at peace are exempt from the civil jurisdiction." "

A midshipman of the U. S. S. "Mohican," who had gone on shore at the port of St. Louis in Maranhão, Brazil, was arrested and taken before the chief of police for having fired five shots from his pistol in the streets of the city at one of his boat's crew who had attempted to desert. On learning his official and national character the chief of police discharged him, calling his attention to his disregard of the laws of the land and the safety of the people in the streets, and warning him against a repetition of the offense—the commanding officer of the "Mohican" requested the United States consul to make a complaint to the Governor of Maranhão against the chief of police for his expressions. The case was then presented by the consul to the United States minister at Rio, Mr. James Watson Webb, who declined to bring it to the attention of the Government of Brazil, but referred it to our Department of State. The State Department replied that the

¹⁷ Moore's Digest, Vol. 2, p. 579.

act of the midshipman "in using a pistol at a deserter in a street of Maranhiam was a breach of the peace, offensive to the dignity of Brazil, which the government of that country may well expect the United States to disallow and censure."¹⁸

59. As to immunity of public vessels other than men-of-war.—

Besides men-of-war, other public vessels, such as transports, colliers, auxiliary vessels, surveying vessels and vessels fitted out for scientific work by the government, are, to the extent that is required by the service of the state owning them, exempt from the local jurisdiction of the port. In the case of the "Parlement Belge," a mail packet, the property of the King of Belgium, carrying his pennant and officered by officers of the Royal Belgian Navy, which had been assimilated, by a special treaty to a man-of-war, a decision in the matter of collision was given in 1878 by Lord Justice Brett of the English Court of Appeals to the effect "That as a consequence of the absolute independence of every sovereign authority and the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign ambassador or public property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."¹⁹

60. Chartered transports under foreign flag.—In the case of the British steamer "Tartar," chartered by the Government of the United States as a transport in the military service, the position was taken by the State Department that while

¹⁸ Moore's Digest, Vol. 2, p. 590.

¹⁹ Scott's Cases, p. 222.

she was so employed she was entitled to be treated in British ports as a troop ship of a friendly power, and hence exempt from the local regulations as to the number of passengers which vessels might carry.²⁰

Attorney-General Cushing decided that a prize partakes of the exemption from the jurisdiction of the port when she is in command of a public or naval officer.

It is finally conceded that a state may close certain of her ports to commerce and general use. Under these circumstances, which actually exist in certain parts of China, Japan, Venezuela and other countries, special permission is necessary for men-of-war to visit and use such ports. Stress of weather in exceptional cases may permit entrance to such ports. In the case of violation of neutrality, or for the purpose of preserving impartial neutrality, it is perfectly within the right of a state to deny the hospitality of a port to vessels of war of certain nationalities during the continuance of hostilities. This was done to us as to certain ports by Brazil and Great Britain during the Civil War, and by Sweden and Norway to vessels of war of the belligerents during the Russo-Japanese War. Various ports are also denied access to in peace times.^{20a}

61. Primarily the merchant vessel is under the jurisdiction of the port.—In 1886 Chief Justice Waite, in his decision in the *Wildenhus* case, says, "It is part of the law of civilized nations that when a merchant vessel of a country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in the case of the 'Exchange,' it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degra-

²⁰ Moore's Digest, Vol. 2, pp. 577-579.

^{20a} See Navy Regulations as to Guantanamo and Pearl Harbor, etc.

dation if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country, and the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. . . . As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled."

62. Immunities of merchant vessels in port.—"From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."²¹

Westlake says further upon this subject, "Matters concerning the ship herself, as the proprietary title to her, damage done by her, salvage due from her, or her seizure in satisfaction of a debt, will belong to the local courts whenever referred to them by the accepted rules of national jurisdiction applied to her actual situation or to the person of her owners, or others interested in her. If the crew, whether on shore

²¹ Scott's Cases, pp. 225-226. Wildenhus Case.

or while remaining on board, commit offenses against other ships in the anchorage, or against the inhabitants of the land, the local courts will punish them and the local authorities will not be under the necessity of requiring her to quit their waters, but will use on board of her whatever force may be needed. Even offenses committed on board of her against persons and things also on board of her will fall under the local jurisdiction if . . . they involve a violation of the rights and interests of a littoral state or of its subjects not forming part of its crew or passengers.”²²

63. French rule as to merchant vessels in foreign ports.—The rule held by the French Government has tended to modify the usage of complete jurisdiction in all matters over the merchant ship and its personnel in a foreign port. This modification is shown both in the decision of Chief Justice Waite in the case of the Belgian steamer “Noordland,” just given, generally known as the *Wildenhus* case, and the remarks just quoted of the English publicist Westlake. These two cases show the English and American advance towards the French rule or view, which is that the officers and crew of a merchant ship lying in a foreign port are not like a party of isolated strangers travelling in a foreign country, but are a body of organized men governed internally by laws of their country, enrolled under the authority and placed under a master or captain who has a standing and recognition by law. The French Government and courts holding this view find a distinction between acts and offenses connected with the internal order and discipline of the ship, when the peace of the port is not disturbed, and other acts which have an external effect. The former they leave to the laws of the state to which the ship belongs; the latter they regard as subject to the jurisdiction concerned. In this distinction we follow them also,

²² Westlake, Part 1, p. 259.

as the decision of Chief Justice Waite in the *Waldenhus* case shows as to our own country, and our consular conventions show with respect to foreign countries. Great Britain has not entered into any convention with us upon this subject.

64. Consular conventions as to right of consuls abroad.—The general rendering of the reciprocal conventions upon the matter is, that consular officers shall have exclusive charge of the internal order of the merchant vessels of their nations. The local authorities are not in any way to interfere except in cases where the differences on board ship are of a nature to disturb the peace and public order in port or on shore, or where persons other than the officers and crew of the vessel are parties to the disturbance. Otherwise the local authorities are to confine themselves to the rendering of forcible assistance if required by the consular authorities.²²

65. Immunity of vessels making passages in external waters.—There is more universal agreement as to the exemption of the officers, crew and passengers of vessels passing through or anchoring in the marginal belt or waters of a state external to the ports and customary anchorages, in so far as their internal life is concerned. As to external acts, such as those concerned with questions of the fisheries, smuggling, navigation, collisions or quarantine, the state would naturally exercise jurisdiction, but as to internal matters, as Hall says, "The state is both indifferent to and unfavorably placed for learning what happens among a knot of foreigners so passing through the territory as not to come in contact with the population. To attempt to exercise jurisdiction with respect to acts producing no effect beyond the vessels, and not tending to do so, is of advantage to no one."

66. As to immunity for political offenders in embassies, legations and consulates.—In Europe, except probably Spain,

²² Moore's Digest, Vol. 2, p. 303.

and in the United States there exists neither by rule nor usage an immunity in embassies, legations or consulates for ordinary criminals or for persons charged with political offenses against the state in which these official residences are placed. In the case of Spain that immunity or right of asylum, as it is often improperly called, was used in the Revolutionary period of 1865-1875. In 1873, after the abdication of King Amadeus, Marshal Serrano was hunted by a mob and took refuge in the residence of the British minister, who subsequently disguised him and accompanied him to a place of embarkation.

Mr. Fish, writing to our minister to Spain about this time, said that "the right of asylum by which I now refer to the so-called right of a political refugee to immunity and protection within a foreign legation or consulate, is believed to have no good reason for its continuance, to be mischievous in its tendencies, and to tend to political disorder."

These views have been frequently expressed and, while our government is not able of itself to do away with the practice of foreign countries, it has not failed, on appropriate occasion, to deprecate its existence, and to instruct its representatives to avoid committing our government thereto.

Since the practice of granting immunity from arrest and asylum in legations and consulates is not in accordance with the rules of international law, "It can be defended only on the ground," Moore says, "of the consent of the state within whose jurisdiction it is brought to be maintained." This view has been accepted by the government of the United States in its instructions to diplomatic officers of the United States, which read as follows:

Par. 49. Immunity from local jurisdiction extends to a diplomatic representative's dwelling-house and goods and the archives of the mission. These cannot be entered, searched or detained under process of local law or by local authorities.

Par. 50. The privilege of immunity from local jurisdiction does not embrace the right of asylum for persons outside of a representative's diplomatic or personal household.

Par. 51. In some countries, where frequent insurrections occur and consequent instability of government exists, the practice of extraterritorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents and is practically recognized by the local government, to the extent even of respecting the premises of a consulate in which such fugitives may take refuge. This government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.²⁸

67. Immunity from arrest when asylum is sought on board ships of war.—Under the general rule of international law and courtesy it is considered wrong to offer or afford an asylum to a criminal or to a person charged solely with a crime against the state in whose friendly waters a vessel of war happens to be for the time. If, however, a criminal of any kind succeeds in getting on board a foreign vessel of war he cannot be apprehended or followed on board by the police or local authorities. The commanding officer has a right to judge for himself whether the crime charged as non-political is so, or is only used as a pretext to prevent asylum being granted to a person in flight for his life on account of his political acts.

The regulations of the United States Navy read as follows upon this subject: Art. 1649. The right of asylum for political or other refugees has no foundation in international law.

²⁸ Moore's Digest, Vol. 2, p. 779.

In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries, officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly nor indirectly invite refugees to accept asylum.²⁶

It is hardly necessary to add that a rigid impartiality should prevail in all such cases between political parties, and that refugees granted asylum should not be allowed to open nor maintain communication with the shore for political or any other purpose.

68. Asylum on board vessels of war as to fugitive slaves.—

In former times when slavery existed in countries that were classed as enlightened, it was customary to surrender fugitive slaves who had sought refuge on board vessels of war. This was urged as a policy of the United States in the earlier days of the Republic. Since slavery is now practically abolished by all members of the family of nations the right of such slaves to refuge and freedom has become the usage. By Art. 28 of the general act of the Brussels Conference relative to the African slave trade, signed July 2, 1890, and ratified by the United States and most of the civilized states, it is agreed that any slave who may have taken refuge on board a ship of war flying the flag of one of the signatory powers shall be immediately and definitely freed. Such freedom, however, shall not withdraw him from the competent jurisdiction if he has committed a crime or offense at common law.²⁷

Before closing this portion of the subject which deals with the conduct and privileges and obligations of the officers and

²⁶ U. S. Navy Regs., 1913, p. 163a.

²⁷ Treaties of U. S.

men of a man-of-war in foreign ports, it is well to give an article of the United States Navy Regulations upon the subject of their dealings with foreigners when in foreign ports.

The commander-in-chief of a fleet, or in his absence the commanding officer, is directed to "impress upon all officers and men that when in foreign ports it is their duty to avoid all possible causes of offense to the authorities or inhabitants; that due deference must be shown by them to the local laws, customs, ceremonies and regulations; that in all dealings with foreigners moderation and courtesy should be displayed, and that a feeling of good-will and mutual respect should be cultivated."²⁸

69. As to immunity of political offenders on board merchant vessels.—"Apart from acts affecting their internal order and discipline, and not disturbing the peace of the port, merchant vessels, as a rule, enjoy no exemption from the local jurisdiction. It is therefore generally laid down that they cannot grant asylum."²⁹

Certain cases in which opposite ground was taken, especially as to passengers in transit, are herewith mentioned as matters of interest and information. The case of Sotelo is one of interest and is given by Moore as follows:

70. The case of Sotelo.—"In 1840 the French packet boat 'L'Ocean,' which made regular voyages between Marseilles, the coast of Spain and Gibraltar, received on board, at her anchorage at Valencia, M. Sotelo, a Spanish ex-minister, who was under prosecution for political offenses. The vessel, having put to sea without knowledge of the number and personality of the passengers who had embarked, entered the port of Alicante, where, during the customs and police inspection, M. Sotelo was recognized, seized, taken ashore and

²⁸ Art. 346, U. S. Navy Regulations, 1909.

²⁹ Moore's Digest, Vol. 2, p. 855.

imprisoned. The captain of 'L'Ocean' protested against what he described as a violation of his flag, and in vain demanded that his passenger be set at liberty, invoking at the same time the right of asylum and the principle of extra-territoriality."

"Diplomatic communications on the subject which were exchanged between the Governments of France and Spain established it in the clearest manner that the conduct of the authorities of Alicante was above reproach; that no injury was done to the flag, since the acts in question pertained to an ordinary merchant ship and to a high measure of police executed inside the port; that M. Sotelo, surreptitiously embarked at Valencia, a Spanish port, could have been regularly seized and arrested on 'L'Ocean' at another port of the same country; and, finally, that the fact that she had been on the high seas a certain time before entering Alicante could not alter the nature of the act done at the place of departure, and proved at the place of arrival, under the dominion of the same laws and of the same territorial legislation." "

71. The case of Gámez.—The case of Gámez was that of a political fugitive from Nicaragua, who voluntarily took passage at San José de Guatemala for Punta Arenas, Costa Rica, on board the Pacific mail steamship "Honduras," knowing that the vessel would enter *en route* the port of San Juan del Sur, Nicaragua. Upon learning the fact of his being on board this steamer, the Government of Nicaragua ordered the commandant of the port of San Juan del Sur, Nicaragua, to arrest Gámez upon the arrival of the "Honduras." When the "Honduras" reached San Juan the authorities of that port requested the captain of the steamer to deliver up Mr. Gámez, which he declined to do, and set sail without proper clearance papers. Of this

" Moore's Digest, Vol. 2, p. 856.

case Mr. Bayard, the Secretary of State, says, "It is clear that Mr. Gámez voluntarily entered the jurisdiction of a country whose laws he had violated.

"Under the circumstances it was plainly the duty of the captain of the 'Honduras' to deliver him up to the local authorities upon their request.

"It may be safely affirmed that when a merchant vessel of any country visits the ports of another for the purposes of trade it owes temporary allegiance and is amenable to the jurisdiction of that country, and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty.

"Any exemption or immunity from local jurisdiction must be derived from the consent of that country. No such exemption is made in the treaty of commerce and navigation concluded between this country and Nicaragua on the 21st day of June, 1867."^a

72. The case of Barrundia.—In the Barrundia case the facts were as follows: General Barrundia, an ex-Minister of War of Guatemala, had been attempting for some time to incite an insurrection in Guatemala from his residence within the Mexican border, Guatemala being at war with Salvador at the time. When, upon complaint of Guatemala the Government of Mexico required Barrundia to leave the borders of Guatemala, he proceeded with two of his followers to Acapulco, a Mexican port, and embarked on board an American mail steamer ostensibly for Panama, but with reasonable certainty for Salvador to join the Salvadoran forces against Guatemala. Upon reaching a Guatemalan port, Champerico, his arrest was determined upon by the Guatemalan authorities, but the master of the mail steamer declined to give him up without the written authority of the American minister resident in Guatemala City. Upon arrival at San José, the second Guatemalan port of call, the

^a Moore's Digest, Vol. 2, p. 868.

letter of the minister was brought on board by the arresting force, which advised the master to give Barrundia up to the Guatemalan officials, stating that the government had promised that his life would be spared. The arrest was then permitted, but Barrundia resisting arrest with fire-arms was killed on board the steamer by the officials attempting arrest. The American minister was removed by the Government of the United States for authorizing the arrest, and the senior naval officer of the United States in port, commanding the U. S. S. "Ranger," was relieved from his command for not offering an unsolicited asylum to Barrundia on board of his vessel.

The Guatemalan Government desired the arrest of Barrundia, both for common crimes and as an enemy of the country within its borders. The arrest was desired as a matter of self-preservation, as Barrundia was on his way to wage war from the southern border, as he already had attempted to do upon the northern border.

It can hardly be claimed that Barrundia possessed immunity from arrest because he was on board of a merchant vessel carrying the American flag, as there is no foundation in international law for this position. As to offering an unsolicited asylum on board the "Ranger," it is needless to say that the position of both the State and Navy Departments is in opposition to such voluntary action. The reason given for claiming immunity from arrest under the circumstances is that an exceptional rule should be adopted or usage acknowledged to exist in Spanish-American states, which is in violation of their rights as sovereign states. Secretary Gresham's letter of December 30, 1893, must be conceded to give the final and authoritative statement of our policy in the matter. In the paragraph that is applicable to the Barrundia case he states as follows:

"The so-called doctrine of asylum having no recognized

application to merchant vessels in port, it follows that a shipmaster can find no exercise of his discretion on the character of the offense charged. There can be no analogy to proceedings in extradition when he permits a passenger to be arrested by the arm of the law. He is not competent to determine whether the offense is one justifying surrender, or whether the evidence in the case is sufficient to warrant arrest and commitment for trial, or to impose conditions upon the arrest. His function is passive merely, being confined to permitting the regular agents of the law, on exhibition of lawful warrant, to make the arrest. The diplomatic and consular representatives of the United States in the country making the demand are as incompetent to order surrender by way of quasi-extradition as the shipmaster is to actively deliver the accused. This was established in the celebrated Barrundia case by the disavowal and rebuke of Minister Mizner's action in giving to the Guatemalan authorities an order for the surrender of the accused.

"If it were generally understood that the masters of American merchantmen are to permit the orderly operations of the law in ports of call, as regards persons on board accused of crime committed in the country to which the port pertains, it is probable on the one hand that occasions of arrest would be less often invited by the act of the accused in taking passage with a view to securing supposed asylum, and on the other hand that the regular resort to justice would replace the reckless and offensive resort to arbitrary force against an unarmed ship which, when threatened or committed, has in more than one instance constrained urgent remonstrance on the part of this government."²²

73. Extraterritoriality in Oriental and African countries.—

There are other exceptions to the ordinary rules of territorial jurisdiction arising from diversities in laws, customs and

²² Moore's Digest, Vol. 2, p. 881.

social life whereby citizens and subjects of states with civilization derived from European sources enjoy an exemption from the operations of local laws in countries of non-European civilization or those possessing civilization of lower degree than European standards. This exemption, which is termed extraterritoriality or exterritoriality is generally based upon treaties, and its scope is regulated by the countries to whose citizens or subjects the exemption is secured. Under this system of exterritoriality local jurisdiction is exercised by foreign officials, generally by consular and diplomatic officials, but occasionally by locally established courts of justice with jurisdiction over persons of their own nationality. This exemption exists in countries like China, Siam, and until its annexation, Korea, in Asia, the Barbary States in Africa, and in Turkey and Egypt.

“In dealing with the subject of extraterritorial jurisdiction,” says Moore, “the fact should be borne in mind that while the system rests, in the Ottoman dominions, upon ancient custom as well as upon the provisions of treaties or so-called capitulations, it was established in China and Japan by the treaties with the western powers, the first being that concluded between Great Britain and China, at the end of the Opium War, in 1842. The importance of this distinction is obvious. It serves to explain the existence in the Ottoman dominions of practices which were not based upon the stipulations of treaties and which formed no part of the extraterritorial system as it was established in China and Japan. Of these practices the principal one is that of the protection granted by the consuls of treaty powers to the citizens of other treaty powers, or to the citizens of non-treaty powers, or even to natives, not by the mere exercise of good offices, but by the assimilation of the person protected to the nationality of the protector.”²²

²² Moore's Digest, Vol. 2, p. 596.

Japan has made such rapid progress in civilization that by treaties made by all of the powers extraterritoriality on Japanese soil ceased, and with it consular jurisdiction on July 17, 1899.

74. Jurisdiction of consular and mixed courts.—The jurisdiction of the consular courts and the United States Court for China established in 1906, and the mixed courts established by the various treaties, is both civil and criminal. The manner of procedure, etc., of the various courts depends upon the law of the country of the consul and upon treaty stipulations. In general terms all crimes committed by citizens or subjects are tried in the consular courts of their own state, while crimes committed against natives by foreigners are tried in the courts of the foreigners who are defendants. In cases between foreigners of different nationalities the trial is generally in the court of the defendant. In civil matters or questions between foreigners and natives the matter is referred generally to a mixed tribunal of foreigners and natives. As a rule there is an appeal in civil cases of sufficient importance to the home courts of a superior grade of the consul's country. In Egypt the consular system of courts has been replaced by a system of mixed or joint tribunals, the judges being partly native and partly foreigners, the latter being in the majority.

With respect to seamen and others on board of men-of-war, while the jurisdiction of the consular court of the same nationality as the seamen is admitted to exist by our State Department in regard to offenses committed on shore, the opinion of the Department has been expressed that the smaller offenses committed on shore, such as over-staying leave, disorderly conduct or drunkenness, should be remitted to the naval authorities in cases where the offenders can be tried and punished on board the vessels to which they belong under

the naval regulations, unless otherwise requested by the naval authorities."²⁴

By the regulations of the United States Navy "men who are convicted by a consular court of a felonious offense (as distinguished from cases of over-staying leave, disorderly conduct, drunkenness and other comparatively minor offenses in which consular authorities have concurrent jurisdiction) cease from the date of such conviction to be in the naval service of the United States."²⁵

75. Extradition.—Somewhat allied to the subject of the right of asylum within the territory of the state of a fugitive is the right of asylum of fugitives in the territory of a foreign state. The return by legal process of such fugitives to the territory of such state where the alleged offenses were committed is known as extradition. Extradition may comprise cases of ordinary criminals and political offenders, but extradition in the latter cases is almost universally denied.

In regard to extradition it may be considered as a recognized doctrine that extradition is a matter under the cognizance of the national governments alone. As to the international obligation of the extradition it rests upon treaties alone, though such rendition has been done as a matter of international courtesy. Mr. Justice Miller, in rendering a decision in the case of the United States *vs.* Rauscher, says:

"It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties and apart from them, it may be stated as the general result of the writers

²⁴ Moore's Digest, Vol. 2, p. 606.

²⁵ Par. 4, Art. 3604, U. S. Navy Regulations, 1913

upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.”³⁰

76. Case of the “Pilcomayo.”—An interesting case occurred on March 31, 1891, in Buenos Ayres, in regard to a mutiny which occurred on board the Chilean gunboat “Pilcomayo” then lying at the docks. At the request of the commanding officer twelve of the mutineers were taken in charge by the local police, with the further request from the Chilean minister that they be held in custody until the “Pilcomayo” was ready to sail for Chile in order that they might be taken there for trial. The “Pilcomayo” was being partially dismantled at the time by the order of the Chilean Government, after which she was to be taken to Chile and placed out of service. The mutineers obtaining a writ of *habeas corpus*, the judge of the Federal Court decided that the exemption of a man-of-war from the local jurisdiction did not extend to the conferring of jurisdiction over persons in foreign territory in charge of foreign authorities, and that the Chilean minister, by requesting the men to be taken from on board the vessel of war under the Chilean flag and placed in the custody of the Argentine authorities, had lost the right to remove them to Chile and have them tried there. It was also intimated that by dismantlement the “Pilcomayo” had lost its character as a vessel of war. On appeal from this decision the Supreme Court of the Argentine Republic “held that as the mutiny appeared to be for political reasons, it was to be

³⁰ Scott's Cases, pp. 276-277.

considered as a political offense; that as the mutineers were brought on shore and delivered to the Argentine authorities because of the inability to retain them on board the vessel, their return to the representative of Chile could not be granted without violating the exemption of political offenders from extradition; that their delivery up would also violate the principle of public law, which protects prisoners of war, whether public or insurrectionary, from surrender; and that it is a rule of international law that where acts of hostility are committed by foreign insurgents in territorial waters of another state, only the vessels or things taken from them, and not the persons, are to be delivered up.”⁸⁷

77. Extradition of deserters.—In regard to the arrest or extradition of deserters from ships of war it has been held, both by the State Department and the federal courts, that in the absence of treaties to that effect officials of the United States cannot at home arrest foreign seamen as deserters from foreign vessels even upon the request of the consular or other officers of foreign governments, and that it is naturally improper in reciprocal cases for one consular or other authorities to cause foreign officials to arrest deserters from our ships in the absence of treaties authorizing and providing for such arrest.

78. Case of Alexandroff.—In the case of *Tucker vs. Alexandroff* there were circumstances surrounding this case which involved several interesting questions as to the return and extradition of a deserter, so that it is considered desirable to narrate the matter in full as given by Moore in his digest.⁸⁸

“Leo Alexandroff, a conscript in the Russian naval service, was sent in October, 1899, as one of the detail of 53 men under command of an officer, from Russia to Philadelphia, to take possession of and man the Russian cruiser ‘Variag,’

⁸⁷ Moore's Digest, Vol. 4, pp. 351-352.

⁸⁸ Moore's Digest, Vol. 4, pp. 423-424.

then under construction by the firm of Cramp & Sons in that city. By the contract between the Russian Government and the builders it was agreed that the vessel to be built, whether finished or unfinished, and all materials intended for her construction and brought upon the premises of the contractors, should immediately become the exclusive property of the Russian Ministry of Marine; that the flag of the Imperial Russian Government should be hoisted on the ship, whenever desired by the board of inspection, as evidence that it was the government's exclusive property; and that the Russian Ministry of Marine might at any time appoint an officer to take possession of the ship or materials, whether finished or unfinished, subject to the lien of the contractors for any part of the value remaining unpaid. The construction of the vessel was to be paid for in instalments, but a percentage of each instalment was to be withheld, and the final payment was not to be made until the ship had made a successful trial trip and had been turned over to the Imperial Russian Government; and that the government was at liberty, unless the vessel should fulfil certain requirements as to draft and speed, to reject her. The 'Variag' was still on the stocks when the detail of men arrived in Philadelphia. She was launched in October or November, 1899, and was lying in the stream still under construction, not having been accepted by the Russian Government, when on April 20, 1900, Alexandroff went to New York and declared his intention to become a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed on a charge of desertion. By Article IX of the treaty between the United States and Russia of 1832, the consular representatives of the contracting parties were authorized to require the assistance of the local authorities for the recovery of 'deserters from the ships of war and merchant vessels of their country'; and it was stip-

lated that for this purpose they should apply to the competent tribunals and 'in writing demand said deserters, proving, by the exhibition of the registers of the vessels the rolls of the crews, or by other official documents established that such individuals formed part of the crews.' Alexandroff was committed under Section 5280, Revised Statutes of the United States, which provides in language similar to that just quoted for the recovery of deserters from vessels of governments having treaties with the United States on the subject. It was contended that the treaty and statute were inapplicable to Alexandroff for the reasons (1) that the 'Variag' was not yet a Russian ship of war, (2) that he was not a deserter from such ship, and (3) that his membership of the crew was not proved by the exhibition of the register of the vessel, her crew roll, or by any official document. It was held by the Court that the 'Variag,' inasmuch as she had been launched and was lying in the stream when Alexandroff deserted, was a ship within the meaning of the treaty; that she was also a Russian ship of war within the meaning of the treaty, notwithstanding that she had not been finally accepted and taken possession of by the Russian Government, and that the Russian flag had never been hoisted upon her; that Alexandroff consequently was a deserter from a Russian ship of war within the meaning of the treaty; and that, as it was admitted and appeared by the record in the case, Alexandroff came to the United States as a member of the Russian navy for the express purpose of becoming one of the crew of the 'Variag,' it could not properly be objected in his behalf that no official documents were produced, especially as it appeared that on the trial of the case below, Alexandroff, through his counsel, waived the production of the passport issued by the Russian Government to the men detailed to man the vessel."³⁰ It was also held that

³⁰ *Tucker vs. Alexandroff* (1902), 183 U. S. 424. Also *Moore's Digest*, Vol. 4, pp. 422-423; Vol. 5, p. 249.

treaties should be interpreted "in a spirit of *uberrima fides*," and in a manner to carry out their manifest purpose.

The courts as a rule hold the exemption of a foreign vessel of war from the jurisdiction of the port on the ground of its being the property of the state engaged in public business. This principle is applied to other property state-owned and in or for public use. English courts, in the case of *Vavasour vs. Krupp*, decided that they had no jurisdiction to interfere with the property of a foreign sovereign, more especially when the property is for or in public use.

79. Servitudes.—There are certain restrictions upon the sovereignty and jurisdiction of states commonly known as servitudes. Servitudes concern states only, and directly, not individuals. The right to use a port or an island for a coaling station would constitute a servitude. The requirement that the port of Antivari, and all the waters of Montenegro, shall remain closed to the ships of war of all nations is a servitude imposed by the Treaty of Berlin. The right of fisheries in foreign waters, such as formerly enjoyed by France in the waters of Newfoundland, is a servitude of an economic form. The stipulation in the Treaty of Berlin that Montenegro shall have neither ships of war nor flag of war is another form of servitude.

By the same treaty all the fortresses and fortifications on the Danube River from the Iron Gates to the mouths of the river, were to be razed and no new ones erected. No vessel of war was to navigate the Danube below the Iron Gates, with the exception of vessels of light tonnage in the service of the river police and customs. The *stationnaires* of the powers at the mouths of the Danube may, however, ascend the river as far as Galatz.⁴⁰

⁴⁰ A. J. I. L., Vol. 2, No. 4, pp. 414 and 420.

CHAPTER IV.

JURISDICTION UPON THE HIGH SEAS AND OTHER WATERS.— IDENTIFICATION OF VESSELS.—PIRACY.—INTEROCEANIC CANALS.

80. What is meant by the high seas.—By the term *high seas* in municipal and international law is meant all of that continuous body of salt water in the world which is navigable in its character and which lies outside of the territorial waters and maritime belts of the various countries.

In a general way this extent of salt water is divided into what may be called the independent seas and the dependent seas. By the independent seas are meant the five great oceans or basins communicating by large openings with one another, and which in area constitute over ninety-three per cent or almost the whole of the salt water of the globe. The dependent seas, like the Mediterranean and Black Seas, on the other hand, constitute less than seven per cent of the salt water area of the world. These dependent seas, like the Mediterranean, have still other dependent seas, like the Adriatic, and so the subdivisions go on. Even the enclosure of waters by the territory of one or more states does not remove its area from within the expression of "high seas," provided a navigable connection of salt water exists between such sea or waters and the general body of salt water, no matter even if such navigable connection be itself part of one or more bordering states.¹

The Sea of Marmora and Bering Sea, for instance, come under the term of the high seas, while the situation of the

¹ Oppenheim, Vol. 1.

Dead Sea and the Ural Sea makes the former Turkish and the latter entirely Russian. There are other large bodies of salt water like the Bay of Concepcion and the Chesapeake Bay which, for reasons given later, are conceded to be territorial waters of the countries within which they are situated.

81. The sea in its effect upon the history of the world.—The preponderating area of the waters of the globe is too well known to require more than a passing allusion. Its effect upon the development of the world is constantly growing. It has, as Nys well says, brought to the work of civilization a powerful aid. Little as it was known in the early ages, still it brought the East to the West and spread the early civilization to Western Europe. When, in turn, the civilization of the known world was centered in Western Europe it gave to the more vigorous people there a larger theatre of action, it made possible communication between the regions of the earth which are most remote from each other; no longer a barrier, it has become a highway to carry on intercourse which has a social and political as well as a commercial consequence. As the earth becomes more and more inhabited by civilized peoples and the development of the continents is caused by the genius of the human race, the sea will play a more and more important part in the history of the world.² In connection with international law, which is the reigning law upon the high seas outside of the narrow sphere of the vessel, the sea bears a most important part, in peace and in war time, and also with respect to those neutral powers who, though not actors in a war, bear a relation of growing importance to those so engaged.

82. Freedom of the high seas.—It is a definite and well-established rule of international law that the high seas are not and never can be under the sovereignty or legal jurisdiction of any one state or group of states.

² Nys, Vol. 2, p. 132.

In this connection and in a book addressed especially to naval officers, it may be well to present the ideas of Ortolan, a French naval officer and writer, in his prelude to a discussion of the open sea addressed as a seaman to seamen. He says that it is above all by seamen that this truth of freedom of the sea is profoundly felt; they understand it by instinct and by intuition. Continuing the subject, he says, when the entrance of a port is left behind and the ship reaches the open sea the experienced seaman recognizes a sentiment of independence which fills him with exaltation. Having at last reached the deep blue water, the surrounding atmosphere is an atmosphere of freedom. The sea is grand, there is room in it for all. Scanning the horizon he finds before him only a free highway. Upon this great highway, upon this road which is always in movement, he asks himself where are the foreign powers that can dictate laws to me? Their laws can only be those of force, they can only be executed by force, and if force compels him to cede he has his own sovereign to appeal to for redress.

The laws of the seaman, as to the internal rule of his vessel, are those of his country which he carries with him in his voyage. In his relations with foreigners the conventions and treaties negotiated by his country guide his conduct. If these treaties are wanting there exist the principles of universal international law, principles which are obligations resting upon all nations.³ In discussing Ortolan's views, Wheaton says that:

83. Physical impossibility of possession of the sea.—I. "Those things which are originally the common property of all mankind can only become the exclusive property of a particular individual or society of men by means of possession. In order to establish the claims of a particular nation to a right

³ Ortolan *Diplomatie de la mer*, Vol. 1, pp. 120, 121.

of property in the sea, that nation must obtain and keep possession of it, which is impossible.”

II. “In the second place, the sea is an element which belongs equally to all men like the air. No nation then has the right to appropriate it, even though it might be physically possible to do so.

“It is thus demonstrated that the sea cannot become the exclusive property of any nation, and consequently the use of the sea for these purposes remains open and common to all mankind.”⁴

84. The maritime territory of a State.—“By the generally approved usage of nations which forms the basis of international law, the maritime territory of every state extends:

“1. To the ports, harbors, bays, mouths of rivers and adjacent parts of the sea inclosed by headlands belonging to the same state.

“2. To the distance of a marine league, or as far as a cannon shot will reach from the shore, along all the coasts of the state.

“3. To the straits and sounds bounded on both sides of the territory of the same state, so narrow as to be commanded by cannon shot from both shores and communicating from one sea to another.

“The reasons which forbid the assertion of an exclusive proprietary right to the sea in general will be found inapplicable to the particular portions of that element included in the above designations.”

85. Ports and mouths of rivers, bays, etc.—1. “Thus, in respect to those portions of the sea which form the ports, harbors, bays and mouths of rivers of any state where the tide ebbs and flows, its exclusive right of property, as well as sovereignty in these waters, may well be maintained, consistently

⁴ Wheaton, ed. by Atley, 1904, p. 292.

with both the reasons above mentioned, as applicable to the sea in general. The state possessing the adjacent territory by which these waters are partially surrounded and enclosed has that physical power of constantly acting upon them, and, at the same time, of excluding, at its pleasure, the action of any other state or person, which, as we have already seen, constitutes possession. These waters cannot be considered as having been intended by the Creator for the common use of all mankind any more than the adjacent land, which has already been appropriated by a particular people. Neither the material nor the moral obstacle to the exercise of the exclusive rights of property and dominion exists in this case. Consequently, the state, within whose territorial limits these waters are included, has the right of excluding every other nation from their use. The exercise of this right may be modified by compact, express or implied, but its existence is founded upon the mutual independence of nations, which entitles every state to judge for itself as to the manner in which the right is to be exercised, subject to the equal reciprocal rights of all other states to establish similar regulations in respect to their own waters."

86. The marine league or maritime belt.—2. "It may, perhaps, be thought that these considerations do not apply with the same force to those portions of the sea which wash the coasts of any particular state within the distance of a marine league, or as far as a cannon shot will reach from the shore. The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the inquiry of the state by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral state from the exercise of acts of hostility by one belligerent power

against another within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular state, in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the state within that distance of the coasts. This exclusive claim is sanctioned both by usage and convention, and must be considered as forming a part of the positive law of nations."

87. Straits and sounds.—3. "As to straits and sounds bounded on both sides by the territory of the same state, so narrow as to be commanded by cannon shot from both shores and communicating from one sea to another, we have already seen that the territorial sovereignty may be limited by the right of other nations to navigate the seas thus connected. The physical power which the state, bordering on both sides the sound or strait has of appropriating its waters, and of excluding other nations from their use, is here encountered by the moral obstacles arising from the rights of other nations to communicate with each other. If the Straits of Gibraltar, for example, were bounded on both sides by the possessions of the same nation, and if they were sufficiently narrow to be commanded by cannon shot from both shores, this passage would not be the less freely open to all nations, since the navigation, both of the Atlantic Ocean and the Mediterranean Sea, is free to all. Thus it has already been stated that the navigation of the Dardanelles and the Bosphorus, by which the Mediterranean and Black Seas are connected together, is free to all nations subject to those regulations which are indispensably necessary for the security of the Ottoman Empire. In the negotiations which preceded the signature of the treaty of intervention of July 15, 1840, it was proposed, on the part of Russia, that an article should be inserted in the treaty recognizing the permanent rule of the Ottoman Empire; that

whilst that empire is at peace the straits, both of the Bosphorus and the Dardanelles, are considered as shut against the ships of war of all nations. To this proposition it was replied on the part of the British Government, that its opinion respecting the navigation of these straits by the ships of war of foreign nations rested upon a general and fundamental principle of international law. Every state is considered as having territorial jurisdiction over the sea which washes its shores as far as three miles from low-water mark; and consequently any strait which is bounded on both sides by the territory of the same sovereign, and which is not more than six miles wide, lies within the territorial jurisdiction of that sovereign. But the Bosphorus and Dardanelles are bounded on both sides by the territory of the Sultan, and are in most parts less than six miles wide, consequently his territorial jurisdiction extends over both those straits, and he has a right to exclude all foreign ships of war from these straits, if he should think proper so to do. By the treaty of 1809 Great Britain conceded this right on the part of the Sultan and promised to acquiesce in the enforcement of it; and it was but just that Russia should take the same engagement. The British Government was of the opinion that the exclusion of all foreign ships of war from the two straits would be more conducive to the maintenance of peace than an understanding that the strait in question should be a general thoroughfare, open at all times to ships of war of all countries; but whilst it was willing to acknowledge, by treaty, as a general principle and as a standing rule, that the two straits should be closed for all ships of war, it was of the opinion that if, for a particular emergency, one of these straits should be open for one party the other ought at the same time be open for other parties, in order that there should be the same parity between the condition of the two straits, when open and shut, and therefore the British Government would ex-

pect that, in that part of the proposed convention which should allot to each power its appropriate share of the measures of execution, it should be stipulated that if it should become necessary for a Russian force to enter the Bosphorus a British force should at the same time enter the Dardanelles.

“It was accordingly declared in the fourth article of the convention that the co-operation destined to place the straits of the Dardanelles and the Bosphorus, and the Ottoman capital under the safeguard of the contracting parties, against all aggression of Mehemet Ali, should be considered only as a measure of exception, adopted at the express request of the Sultan and solely for his defense, in the single case above mentioned; but it was agreed that such measure should not derogate in any degree from the ancient rule of the Ottoman Empire, in virtue of which it had at all times been prohibited for ships of war of foreign powers to enter these straits, and the Sultan, on the one hand, declared that, excepting the contingency above mentioned, it was his firm resolution to maintain, in future, this principle invariably established as the ancient rule of his empire, and so long as the Porte should be at peace, to admit no foreign ship of war into these straits; on the other hand, the four powers engaged to respect this determination, and to conform to the above-mentioned principle.

“This rule and the engagement to respect it, as we have already seen, were subsequently incorporated into the treaty of the 13th of July, 1841, between the five great European powers and the Ottoman Porte; and as the right of private merchant vessels of all nations, in amity with the Porte, to navigate the interior waters of the empire which connect the Mediterranean and the Black Seas was recognized by the Treaty of Adrianople in 1829 between Russia and the Porte, the two principles—the one excluding foreign ships of war and the other admitting foreign merchant vessels to navigate

those waters—may be considered as permanently incorporated into the public law of Europe.”^{*}

The foregoing sentiment of the laws of nations as to ports, harbors, mouths of rivers, gulfs and bays and straits and sounds, ably supplements by Wheaton the reasoning of Ortolan upon the freedom of the seas. Its statement of the European rule as to the Dardanelles and the Bosphorus at the time of the publication of Wheaton in its original edition holds good at the present time, notwithstanding the Crimean War and the development of Russian territory on the shores of the Black Sea. By the Treaty of London of 1871 the right of exclusion of men-of-war from the Dardanelles and Bosphorus by Turkey was upheld, and at the same time the right of free navigation for merchantmen of all nations was again confirmed. It has been customary for the Porte to grant permission for small vessels of war to pass through the straits and anchor off Constantinople in the service of the missions of foreign powers. This has been generally granted to the United States, although it is not a signatory power to the treaties mentioned above providing for the exclusion of foreign vessels of war. It, however, acquiesces in these treaties, and has in exceptional cases been granted permission to send a large vessel of war to Constantinople. The additional power given to the Sultan by the Treaty of London, of March 13, 1871, to open the straits in time of peace to vessels of war of friendly and allied powers is in case he should judge it necessary to secure the execution of the general Treaty of Paris of March 30, 1856.

88. The Straits of Magellan.—The Straits of Magellan, which in places can be commanded by fortifications, is also entirely within the territory of Chile. But it is held free to all vessels of war, as well as to merchantmen at all times, because, in

^{*} Wheaton, ed. by Atley, pp. 292-297.

the first place, it is a passage from the Atlantic to the Pacific Ocean, and in the second place it is stipulated by the boundary treaty of 1881 between the Argentine Republic and Chile that these straits are neutralized forever and declared open to the vessels of all nations. It is further provided, in order to insure this liberty and neutrality, that no fortifications or military defenses shall be created that could interfere with this free navigation in peace or war.

89. Lakes and land-locked seas.—Lakes and land-locked seas entirely enclosed by the territory of a state are parts of the territory of that state. Lake Michigan is entirely American, Lake Como, Italian, and Lake Nicaragua, Nicaraguan. As to such lakes and land-locked seas as are surrounded by the territory of several states the rule is not well settled. The general consensus of competent opinion, however, is in favor of considering these lakes and seas as parts of the enveloping territories. The question is generally arranged upon that basis by agreement of the bordering states. Those lakes and land-locked seas which are also reached by navigable routes from the high seas, like the Great Lakes and the St. Lawrence River, are often called the international lakes and land-locked seas; and are common in use to all of the inhabitants of the two countries which they separate. By the Treaty of Washington such free navigation to the sea is provided for.

90. Rivers.—Rivers lying entirely within the boundaries of one country, from its sources to its mouth, belong to that country exclusively. This class of rivers is represented by the Mississippi, the Hudson and the Sacramento in the United States, all of the rivers of Great Britain, the River Seine of France, and the Volga River of Russia.

Rivers running through the territory of several countries, or boundary rivers separating two different states, are in a different category. These rivers are the property of several states, but if navigable from the high seas free navigation is almost

universally allowed for merchantmen of all states by treaties or under some general agreement. The Danube and the St. Lawrence are examples of this group of rivers. Where a navigable river forms the boundary of states, and also their territorial jurisdictions, the middle channel forms the line of separation. As a general rule this line runs through the middle of the deepest channel. In case the deepest channel is not suited for the purposes of navigation the dividing line would be the middle of the one best suited and ordinarily used for that purpose. The division of the islands in the river and its bays follows the same rule.

91. The Amazon.—The Amazon River, after various changes, has been declared open to merchant vessels of all nations; this includes men-of-war, so far as the maritime ports of the Amazon are concerned, but the Brazilian Government in 1899 stated that according to the rule of Brazil the commander of a foreign man-of-war before ascending the Amazon must obtain a formal permission from the Governor of Para, on a written request made by the proper consul there.*

By the general act of Berlin of February 25, 1885, Art. II, all nationalities have free access to the Congo and its affluents, including the lakes, as well as to any canals that may be constructed to unite the water courses or lakes within the territories of the state. This includes the free navigation of the Congo and all of its branches.

92. Limitation of armaments on the Great Lakes.—By an arrangement made between the United States and Great Britain in 1817 the naval force to be maintained by each government on the Great Lakes was limited on Lake Ontario to one vessel not exceeding 100 tons and armed with one 18-pound cannon; on the upper lakes, two vessels not exceeding the same tonnage and armament, and on Lake Champlain one vessel not to exceed the tonnage and armament mentioned. All other

* Moore's Digest, Vol. 1, p. 48.

armed vessels on the lakes were to be dismantled and no other vessels of war were to be thus built or armed. This arrangement remains practically in force at present.

93. Territorial gulfs and bays and entrances.—Great Britain claims that the Bay of Concepcion in Newfoundland is British territory, although it goes forty miles inland and has an entrance fifteen miles wide; while the United States claims on the other hand both the Chesapeake and Delaware Bays as within their jurisdiction. In the case of the Delaware the assertion is made that Delaware Bay is the expansion of the Delaware River, and the Chesapeake rests upon physical possession. The Institute of International Law has recommended a rule that if such bays and gulfs have been considered territorial for more than one hundred years the claim should be conceded. As a matter of fact the claims of the United States over Chesapeake and Delaware Bays have not been questioned, and hence may be considered well established.

94. Bays of Newfoundland.—As to the bays of Newfoundland the question may be considered as settled in the award recently made on September 7, 1910, by the Court of Arbitration at The Hague as to the disputed matter involved in the fisheries questions.

The British contention as to the meaning of a bay was that all bodies of water having the definite configuration of bays in a geographical sense were really bays, and that the three-mile limit within which local jurisdiction was supreme was to be measured at right angles from an imaginary straight line drawn from headland to headland. This contention was sustained by the court, over-ruling the American contention, which was that if the distance was over six miles from headland to headland the indentation could not be considered a bay. The court recommended, however, that Great Britain should consent to the fixing of the three-mile limit so that when a bay is wider than ten miles across from head-

land to headland the marine league should follow the sinuities of the coast.

95. The jurisdiction exercised on the high seas.—Although the high seas as territory is free from the jurisdiction and police of any state, the persons and things passing on these seas are not free from the rules of international law and of municipal law in time of peace and war. Hence, a condition of lawlessness or anarchy does not exist with respect to the persons and property that frequent the seas. The municipal law of the state to which the ship belongs, and whose flag it legally carries, extends over the ship and the persons which it carries as officers, passengers or crew. This jurisdiction is exclusive in time of peace, with the general exception of cases of piracy or for some international crime, made so by special or general compact, such as the slave trade. There are still other exceptional cases, such as acts done in a great and sudden emergency by order of the state for purposes of self-preservation, and the chase and seizure of a vessel beyond the maritime belt for violation of a revenue law. This latter act is considered to be allowed by the express or tacit consent of the state affected, and not as a settled rule of international law.

96. Jurisdiction of the marine league.—As mentioned previously it is a well-established rule of international law that a state has exclusive jurisdiction within the marine league bordering its sea coast with respect to police and general control. This control includes the regulation and protection of the coast fisheries, the enforcement of the customs laws by the prevention of smuggling, the maintenance of neutrality within the league in war time, the prevention and punishment of breach of the peace and the defense of the bordering territory against hostile attack.

97. Innocent passage through territorial waters.—According to almost general usage the marine league is open

to merchant vessels of all states for innocent navigation and passage. This rule of innocent navigation is, however, not an absolute one, and can have its exceptions, such as when the state within whose jurisdiction these waters lie desires to reserve the trade for its own vessels in peace or war. Or it may be considered necessary on account of its defenses, either harbor, coastal or submarine, to divert vessels from certain routes. If, however, such passage through marginal waters is necessary to reach other waters, such innocent passage cannot be entirely denied in times of peace. If the passing vessel anchors the police control becomes closer, as also in cases of collision or of shipwreck.

As a rule, crimes committed within the maritime belt on board of merchantmen passing through for other regions, either against property or persons within the vessel, are considered to be outside the jurisdiction of the bordering state, but if they involve the rights or interests of this state or its inhabitants or citizens outside of the ship they are then to be taken cognizance of.

The right of foreign men-of-war to pass freely and inoffensively within the maritime belt of a state is in a different category. Such passage, however, can be considered as a permitted usage, but hardly as a well-established right, except when used as a transit over a necessary highway to other waters and countries.

98. Cases of self-protection and arrest outside of the maritime belt.—There are certain circumstances and certain purposes under which there is tacitly allowed an extension of jurisdiction and liberty of seizure beyond the maritime belt. One is under the general rule of self-preservation or self-protection; an arrest is allowed of a vessel or expedition manifestly engaged in an hostile attack or expedition in time of peace against the territory of the neighboring state; the other is when a vessel committing a crime or violation of the laws

of the state is chased into the high seas beyond the territorial limits or marginal belt and there arrested and brought back.

In cases of self-protection the principle involved is the same as that involved in the case of the "Caroline" on our Canadian border during an insurrection in which it was finally admitted by our government that such an invasion of foreign territory for self-defense or self-protection might in extreme cases be held as justifiable, although it was beyond the ordinary course of international law. It was held by the American Government that the emergency and necessity causing such extraordinary action as took place should be instant, overwhelming and leaving no choice of means and no moment for deliberation.

It has been claimed that the seizure of the "Virginius" in 1873, if it had been put upon that ground by the Spanish authorities, might have been considered as justifiable.

- **99. Case of the "Virginius."**—The case of the "Virginius" was as follows: In October 31, 1873, the steamer "Virginius," flying the American flag and having an American register, was captured by the Spanish man-of-war "Tornado" on the high seas. The "Virginius" was taken into Santiago de Cuba where, after a trial by a court martial upon the charge of piracy, fifty-three of those on board, Americans, British and Cubans, were condemned to death and shot. The rest were held as prisoners. The British man-of-war "Niobe" arriving at Santiago on November 8 demanded that no further executions of British subjects should take place until after further investigation by higher authorities. This was done. The charge of piracy appears to have been based upon the fact that the vessel was engaged in the service of Cuban insurgents in conveying arms, ammunition and men to aid the Cuban insurrection.

After some correspondence by telegraph upon the matter,

Secretary Fish and the Spanish minister agreed upon the following:

Spain stipulated to return forthwith the "Virginus" and the survivors of her passengers and crew, and on December 25th following to salute the flag of the United States unless before that date Spain should prove to the satisfaction of the United States that the "Virginus" was not entitled to carry the American flag, in which case the salute was not to be required, but a disclaimer of intent of indignity to the flag was to be expected by the United States. If on or before December 25th it was made to appear to the satisfaction of the United States that the "Virginus" did not rightfully carry the American flag, the United States was to institute legal proceedings, after inquiry, against the "Virginus" and against any of the persons who may appear guilty of illegal acts.

It was finally found that the "Virginus" at the time of her capture was improperly carrying the American flag and the salute was hence dispensed with. The "Virginus" was delivered over to the United States Navy at Bahia Honda, but on her passage to New York sunk off Cape Fear in bad weather, being in an unseaworthy condition. The prisoners who survived the massacre were surrendered at Santiago and reached New York in safety, and an indemnity of \$80,000 was paid for the relief of the families of persons who were American citizens.

The British Government demanded and obtained compensation for the families of the British subjects who were executed. Their ground of complaint against the Spanish officials at Santiago was that after the capture of the people of the "Virginus" had been made there existed no emergency of self-defense, and that the offenders should have been prosecuted in proper form of law, and regular proceedings of a civil nature should have been instituted. It was also maintained

that had this been done it would have been found that "there was no charge either known to the law of nations or to any international law under which persons in the situation of the British crew of the "Virginus" could have been properly condemned to death."

The charge of piracy against those executed from the "Virginus" was without reason, and their execution was without justifiable excuse. The "Virginus" was not fitted for offense or defense as a ship by reason of her equipment and also offered no resistance. At most she was engaged in an illegal expedition, and could have been seized within territorial waters of Spain or Cuba for that reason. It does not seem, however, that such a seizure would have been justifiable on the high seas as the emergency for self-defense and self-protection was not sufficiently great or imminent. The result of landing a motley force of one hundred men on Cuban soil does not justify the arrest of a foreign vessel on the high seas in times of peace. The necessity for self-defense should be "instant, overwhelming and leaving no choice of means, and no moment for deliberation." So far as the question of the rightfulness of the "Virginus" to carry the flag was concerned at the time of her arrest this was not known. She was arrested as an American vessel; it was discovered at a later date only that she had no such right.

100. The question of hot pursuit and arrest on the high seas.—

A vessel may be chased, it being tolerated by usage, when it has committed a crime or violation of laws of a state within its jurisdiction, and the pursuit of the vessel is begun within the jurisdiction of the offended state. The pursuit may be continued outside of the territorial limits and the arrest made on the high seas. The "hot pursuit" must be continuous, and if once abandoned it cannot be resumed. If the vessel

¹ Moore's Digest, Vol. 2, p. 903.

violates the laws by means of her boats within the maritime belt, remaining herself outside of the limits she is liable to pursuit and seizure on the high seas as she is through her boats constructively within territorial waters.

101. Case of the "Araunah."—In the case of the British Columbian sealer "Araunah," which was seized by Russian authority in 1888 in Bering Sea, it appeared that the crew were carrying on their operations in canoes between the schooner and the land, and it was affirmed that two of the canoes were within half a mile of shore. Lord Salisbury decided that even if the "Araunah" was herself outside the maritime belt the fact that she was by means of her boats carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation.

102 Case of the "Itata."—In 1891, during the civil war in Chile, the leaders of the Congressional party, which had not then been accorded belligerent rights, sent to the United States the armed transport "Itata" for the purpose of carrying to Chile a cargo of arms and munitions of war for the insurgents. The "Itata" was subsequently seized at San Diego, California, on a charge of violation of the neutrality laws. While in charge of a care-keeper of the United States marshal the "Itata," against his will and protest left the port. The marshal's keeper was put on shore and the "Itata" then proceeded to San Clemente Island nearby, and within the jurisdiction of the United States; here she received a cargo of arms and ammunition which had been sent from San Francisco, and then proceeded to Iquique, Chile, under the convoy of the Chilean cruiser "Esmeralda," then in the service of the insurgents. Orders had been given in the meantime to the U. S. S. "Charleston" and the U. S. S. "Omaha" to go in search of the "Itata," and if she was found at sea to seize her and bring her into port. If she was convoyed by a Chilean war vessel the circumstances of the escape were

to be explained and a demand made for her restoration to the possession of the United States; if this demand was refused, it was to be enforced if practicable. The "Itata" arrived, however, at Iquique without being intercepted; but before her arrival there the insurgent authorities expressed disapproval of what had been done and promised to restore her to the possession of the United States, together with the cargo of arms, etc., taken on board in San Diego. When they found that the arms, etc., had been taken on board at San Clemente Island instead of San Diego, the insurgent authorities desired to retain them, but Rear-Admiral McCann, the senior United States naval officer at Iquique, declined to accede to this request, as the arms were taken on board within the jurisdiction of the United States and the vessel, though no demand for her surrender had been made, was given up, together with her cargo, and returned to San Diego to abide the judgment of the court.^a

103. Fisheries.—It has been already stated that fisheries within the maritime belt of coastal waters and in narrow territorial waters can be properly reserved by the bordering state or states for their own citizens or subjects. As to fisheries upon the high seas, these are naturally open to all states, with a few peculiar exceptions sanctioned by long usage, like the pearl fisheries of Ceylon and the Persian Gulf, which are carried on at a distance of twenty miles from the shore line, and for which certain rules are enforced against both British and foreign subjects.

But because the high seas are open to all fishermen it does not follow that such fishing is without police restriction and regulation. In the absence of treaty stipulations this policing can be done by municipal law applied by the states concerned to the vessels under their jurisdiction. There are also inter-

^a Moore's Digest, Vol. 2, pp. 985, 986. The mixed commission established for this case decided that the action of the United States was unwarranted so far as the arrest in Chilian territory was concerned.

national treaties controlling certain fisheries which provide for international supervision by special patrolling vessels of the states concerned. This is the case with North Sea fisheries in Western European waters, also with the fisheries near Iceland and the Faroe Islands, and to a less extent by the seal fisheries in the Bering Sea.

Jurisdiction of a State over its vessels on the high seas.—

The jurisdiction of a state over vessels legally carrying its flag upon the high seas is necessary to provide order upon the seas, and is required by the rules of international law. No other sovereignty on the high seas being possible, international and municipal law unite to create order out of possible chaos.

104.It is required then most of all that every state which has shipping must adopt regulations under which vessels of its jurisdiction can legally carry its maritime flag, such vessels being furnished with official documents giving them the right to carry such flag of the state. If a vessel carries such flag without proper authority upon the high seas the state concerned has a right to punish the offending vessel.

All vessels, with the persons and cargoes carried by them, are, while on the high seas, considered to be under the exclusive domain of the states whose flag they legally carry.

Every state has a right to punish piracy on the high seas, even if committed by foreigners and foreign vessels. In order that the police of the seas may be effectively carried out the right is given by the laws of nations to determine the true character of vessels suspected of piracy.

105.Flags for maritime service may be of a special design.—

The flag carried by a privately owned or merchant vessel may be a special flag adopted for such maritime use, or it may be the same flag carried as an evidence of nationality for all purposes ashore and afloat. With the United States the flag is the same in all cases, with the exception of regularly enrolled

yachts which carry a flag prescribed by the Secretary of the Navy, consisting of an American ensign with a white foul anchor in the union, surrounded by thirteen white stars formed into a circle. The French Republic has also a common flag for all purposes. Other countries vary as to their maritime flag, a distinction being generally made between the flag carried by the merchant marine and that of the navy.

Each country is, as has been said, the sole judge of the right of a vessel to carry its flag. The conditions required are different in different countries. The United States, for instance, requires that in order that a merchant vessel be considered to be a properly documented vessel of the United States that it must, with a few exceptions only, be built in the United States, and must always be owned by Americans. Great Britain and Germany require their vessels to be exclusively owned by their subjects or by corporations established in their territory. France requires only part ownership by its citizens, while Argentina allows vessels to carry its flag which are entirely owned by foreigners.

106. As to vessels of inland States on the high seas.—Vessels belonging to persons who are subjects or citizens of inland states or states without a naval or mercantile marine must obtain authority to sail under the flag of some other state if they wish good standing and protection on the high seas. This has been done by Switzerland in regard to certain vessels, though it has been claimed at times that this state has a right to such a maritime flag, but the difficulties of this proceeding have been recognized. This state being without seaports of her own, vessels carrying the Swiss flag would have to depend upon the good-will of the maritime powers. It is a question more of convenience than of right.*

It is not permissible for a vessel to sail under more than

* See Oppenheim, Vol. 1, pp. 312, 313.

one flag; if she attempts to sail under two flags she forfeits all protection and legal standing. Any vessel, although foreign-owned, which sails without authority under the flag of a state, may be captured by the men-of-war of such state and brought into port, prosecuted, punished and, if the law requires, confiscated.¹⁰

107. Papers of merchant vessels.—In general merchant vessels are required by the municipal laws of their various states to carry all or most of the following papers printed and written in the language of their states:

1. A document showing the right to carry the national flag as an evidence of nationality. This is generally known as the register.

2. The muster roll of the crew.

3. A log book of daily occurrences.

4. A manifest or list of the cargo. This is not absolutely necessary, as it is a summary of the bills of lading. It generally indicates position of storage.

5. A bill of lading, which is virtually a receipt for the cargo, and should give ports of shipment and discharge, and the consignees.

6. A charter party or contract between the owner of the vessel and some other party by which the vessel is hired for some certain length of time.

7. The shipping articles. The contract between the master and seamen, signed by both parties.

8. Invoices of goods, with account of the nature of the goods.

9. Bill of health. As this states to what port the ship is bound it checks other papers.

10. Clearance, which is a certificate that permission to sail has been given.

¹⁰ *Idem*, p. 137.

108. Yachts.—Yachts are not required by the laws of the United States to carry any papers unless they are engaged in trade, but if over twenty tons they may be enrolled and thus procure a license and commission from the collector of the port which exempts them from entering or clearing from domestic ports.

Congress may enact a law or pass a resolution granting an American register to a foreign-built ship. All merchant vessels of the United States engaged in foreign trade must be registered, except those sailing upon the Great Lakes and those trading exclusively abroad under a bill of sale.

Besides yachts, vessels engaged in the coasting trade or fisheries are also enrolled with a license.

109. Vessels under bill of sale.—The right of citizens of the United States to acquire property in foreign ships has been held to be a natural right independent of statutory laws, and such property is as much entitled to protection by the United States as any other property of a citizen of the United States.

A consular officer may make record of a bill of sale in such cases and deliver to the owner a certificate to that effect, and a certificate of citizenship which will be the certificates of nationality in place of the register.

As these vessels are not registered, enrolled or licensed, they cannot import merchandise from foreign ports to the United States or engage in the coasting trade. They have the right to fly the flag of the United States.

It has been determined by decision of the Supreme Court of the United States that a British subject on such a vessel is within the jurisdiction of a United States consular court in case of crime.

110. Identity of vessels.—Every state is expected to register the names of all private vessels sailing under its flag, and to require them to carry their names, generally on the bow and stern, sufficiently large in size to enable the names to be

read from a distance. No vessels while remaining under the same flag should change their names without proper permission and fresh registration.

111. Jurisdiction over foreigners on ships on the high seas.—

Although there is jurisdiction on the high seas over persons and things by the state whose flag is over the ship, there is also, with respect to foreign persons of the crew or passengers, a similar relationship to that existing with foreigners abroad in other jurisdictions on land. Such foreigners are under the civil and criminal jurisdiction of the state in which they sojourn, but nevertheless the home state can legislate with respect to its citizens or subjects who sojourn abroad or travel in foreign vessels. This legislation cannot, of course, be enforced so far as their persons are concerned until they return to home jurisdiction. Crimes committed on board ship on the high seas by foreigners are considered as happening in the territory, and therefore within the territorial jurisdiction of the state whose flag is carried by the vessel.

112. Collisions.—In matters concerning the rules of the road and other regulations for preventing collisions, and for saving lives after collisions, there are no rules that can be said to exist under international law; but each maritime state, by its municipal law, has prescribed regulations for signals, courses, lights, speed, etc., which are in general the results and conclusions of international conferences assembled for this purpose, and duly recommended for adoption by the maritime states concerned, both for uniformity of practice and for general safety.

In cases of collisions occurring upon the high seas between two vessels of different but foreign nationalities, the Supreme Court of the United States has decided that admiralty courts of the United States may take jurisdiction. Judge Deady, of the United States District Court of Portland, Oregon, in

rendering a decision in a case of this kind, said, "The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found.

"As to the law which should be applied in cases between parties or ships of different nationalities arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."¹¹

Cases of collisions have occurred between vessels of war and public vessels and merchant vessels where the former have allowed trials to be carried on by foreign courts of admiralty and appealed to the highest tribunals, not, however, in submission to the jurisdiction of the courts, but for the purpose of having the facts established and the damages judicially determined.

113. Shipwreck on the high seas.—It is now generally considered that goods and persons shipwrecked upon the high seas do not thereby lose the protection of the state of the shipwrecked vessel. Provision for salvage is generally made by municipal law in such cases.

114. Vessels of war on the high seas in peace time.—Vessels of war are representatives of the sovereignty of the state under whose flag they sail, being parts of their armed forces. They retain their representative character upon the high seas as well as in foreign territorial waters. They must, however, be duly commissioned and manned by the state, and be under the command of a responsible officer in the service of the state.

¹¹ Scott's Cases, p. 342.

115. Other public vessels.—Other public vessels consist of dispatch vessels, transports, storeships of various kinds, tenders, revenue marine vessels, colliers and vessels temporarily or permanently employed in service for public purposes only. It is necessary that such vessels should be given a public character by law or by being in charge of an officer holding such a warrant or commission that would render the vessel a public one under the law.

116. Identification of a vessel of war.—A vessel of war is distinguished from other vessels by her external appearance and by the flag and pennant which are carried. The nationality of a vessel of war upon the high seas is generally determined by the display of her colors and pennant. As a rule the pennant is not carried by other than vessels of war, or vessels in the service of the national government. The armament of a vessel and the military character of her crew also may be considered as external signs of her employment.

If, notwithstanding these evidences, a doubt is entertained as to the vessel being properly a public vessel or ship of war, the statement of the commander, on his word of honor, that the vessel is of that character is customarily accepted as a matter of courtesy. The commission from the state under which the commander serves must, however, be received as conclusive, and as a bar to all further inquiry.¹²

117. Limitation to freedom on the high seas.—There are certain exceptions to the right of freedom on the high seas, so far as the exclusion of the exercise of authority over vessels by vessels of a foreign state, which are permitted under international law and agreed upon by all nations. There are those involved with war, such as the exercise of the right of search and of seizure, which are involved in operations

¹² F. SNOW, ed. by Stockton, pp. 38-39.

of blockade and for the capture of contraband against neutral vessels. There is also the right of capture of belligerent vessels. These are exercised only in war time.

118. Rights over other vessels in war and peace.—In times of peace there is the right of hot pursuit to stop at foreign waters, and there is also the right of arrest in case of piracy; these are under general international law. By treaty agreement there is the right of search and seizure in case of the slave trade in certain regions, and in special convention, in case of the North Sea fisheries, the control over the fishing vessels there engaged, and also the right of verification with regard to merchant vessels intentionally damaging submarine telegraph cables.

119. Right of approach.—As an accessory of the right to seize piratical vessels there exists what has been called the right of approach. The authority for this action has been expressed in a decision of the United States Supreme Court in the case of the "*Mariana Flora*," a small Portuguese armed merchantman. It was decided then that ships of war properly commissioned had the right to approach merchant or other vessels in time of peace upon the high seas for the purpose of observation and verification of flag and character. This does not require the vessels so approached to lie to or await such approach, and no force is to be used unless in case of piracy or the slave trade.

120. Piracy.—Piracy, normally speaking, is an act of real or threatened violence without proper authority committed by a privately owned vessel upon the high seas with the intent to plunder. This act can be committed against another vessel or may include a mutiny on the high seas on the part of the crew with the seizure of the ship and its cargo for the use of the mutineers.

Piracy, as just defined, is a crime under international law,

and the offenders are criminals and enemies of every state and can be arrested by any one and brought to trial under any jurisdiction. By piracy the offenders lose the national character and protection.

If the crew or part of the crew of a man-of-war or other public vessel mutinies and takes possession of the vessel and cruises for plunder, committing piratical acts, this vessel loses her public character and becomes a pirate. If the man-of-war remains a subordinate unit under state authority she cannot be considered as a pirate, as the state as controlling agent remains responsible for her acts.

A simple act of violence within the vessel and without the animus of plunder is not necessarily piracy under international law, but the capture of the cargo or of persons for ransom, even if the vessel itself is freed, can be properly defined as piracy. Acts of successful intimidation are as criminal as acts of violence, provided the piratical motive exists, and the same can be said even if the violence attempted is unsuccessful. The intimidation must give control to the vessel and its movements or to the cargo.

121. Pirates, where arrested.—Piracy under international law must be upon the high seas or upon waters not under civilized jurisdiction to be within the jurisdiction of any arresting person. If, however, the pursuit is begun upon the high seas the pirates may be attacked and captured within the maritime belt of another state, to be surrendered to that state for trial.

If possible a pirate must be brought into port for trial after capture, but if this be impossible he may be executed upon the spot if there should be no doubt of his guilt. By the law of nations the proper punishment for piracy is death, but this is not mandatory upon the states which, by their own municipal code, do not award death as a penalty for crime. So,

too, the laws of nations permit, but do not require, the pursuit and punishment of piracy as a duty; in Germany, for example, the criminal code does not allow the punishment of foreigners committing piracy against foreign vessels.¹²

122. Slave trade and other crimes of piracy.—Piracy, according to municipal law, may have a wider range given it than by international law. By English law, for instance, any English subject who transports slaves on the high seas, or who gives aid or comfort upon the sea to the King's enemies during a war, is deemed to be a pirate. In the United States the law as to piracy is the same with respect to the slave trade, and also embraces other offenses such as offenses punishable with death on shore. To deliberately burn, cast away or destroy any ship, or to commit acts of hostility against the United States or against citizens on the high seas under pretense of authority from any person is piracy.

123. Area of right of search of slave trade.—In the agreement for the repression of the African slave trade, concluded and signed July 2, 1890, by various countries, including the United States, the signatory powers agreed to restrict the clauses of the special conventions for the suppression of the slave trade concerning the reciprocal rights of visit, of search and of seizure of vessels at sea to a certain maritime zone on the east coast of Africa, in which the slave trade still existed, and to vessels whose tonnage is less than 500 tons.

124. Submarine telegraph cables.—Any state has the right to lay telegraph or telephone cables in any part of the high seas, but any state can forbid the laying of cables within its maritime belt or the landing of such cables upon its territory.

125. Paris conference of 1882.—An international conference was held in Paris in 1882 which dealt with the question of the protection of submarine cables on the high seas from damage

¹² Oppenheim, Vol. 1, pp. 325-332.

by outside vessels. All of these regulations were made to apply for the time of peace alone, and in no wise restricts the action of belligerents in time of war with respect to submarine cables.

126. Interoceanic canals.—Ordinary canals within the territory of one and the same state have somewhat the same status as rivers, under international law, in similar situations. Interoceanic canals are, however, on a different basis. Those within the territory of one state only, like the Kiel Canal, connecting the Baltic and the North Seas, are exclusively under the control of that state. Germany allows the navigation of this canal under ordinary circumstances by vessels of all other nations. Being built mainly for strategic purposes its navigation is exclusively under the control of the German Empire at all times.

The only other interoceanic canal existing worthy of the name is the Suez Canal, which connects the Mediterranean and Red Seas, and affords a short water route to the Orient. This canal is in Egyptian territory, which is nominally Turkish, but is practically under the control of Great Britain.

127. Suez Canal.—By the Convention of Constantinople of October 29, 1888, the Suez Canal was declared open in time of peace and war to merchantmen and men-of-war of all nations. In the declaration respecting Egypt and Morocco, signed at London, April 8, 1904, by Great Britain and France, Article 6 reads as follows: "In order to ensure the free passage of the Suez Canal, His Britannic Majesty's Government declares that they adhere to the stipulations of the treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the canal being thus guaranteed the execution of the last sentence of Par. I, as well as of Par. II, of Article 8 of that treaty, will remain in abeyance." These paragraphs refer to a watching over the canal with regard to men-of-war

in time of war and peace by the agents of the signatory powers.

The rules of the Convention of Constantinople of 1888 being so radically different from those adopted under that name in the Hay-Pauncefote Treaty of 1901, it may be well to quote those affecting the transit of men-of-war and the construction of fortifications.

Art. I of this convention states that "The Suez Maritime Canal shall always be free and open in time of war as in time of peace to every vessel of commerce or of war without distinction of flag."

Consequently the high contracting parties agree not in any way to interfere with the free use of the canal in time of war as in time of peace.

The canal shall never be subjected to the exercise of the right of blockade.

Art. IV reads as follows: "The maritime canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Art. I of the present treaty; the high contracting powers agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal shall be committed in the canal and its ports of access, as well as within a radius of three (3) miles from these ports, even though the Ottoman Empire should be one of the belligerent powers."

In Art. X provisions are made that Arts. IV, V, VII and VIII shall not interfere with the measures which the Sultan of Turkey and the Khedive of Egypt might find it necessary to take for securing by their own forces the defense of Egypt and the maintenance of public order.

Art. XI, however, adds that the measures which shall be taken in the cases provided for by Arts. IX and X of the present treaty shall not interfere with the free use of the

canal. In the same cases the erection of permanent fortifications contrary to the provisions of Art. VIII is prohibited.

Art. XVI provides that the high contracting parties undertake to bring the present treaty to the knowledge of the states which have not signed it, inviting them to accede to it.

The signatory powers to this convention are Great Britain, Germany, Austria-Hungary, Spain, France, Italy, the Netherlands, Russia and Turkey.

The Suez Canal was constructed by a private company, the Khedive of Egypt being in 1860, and at the time of its completion, the largest individual stockholder. In 1875 the British Government bought from the Khedive the shares remaining in his possession, about forty-four per cent of the entire holdings. The remainder of the shares are held principally in France, with a few in Austria and the Netherlands.

During the Spanish-American War Mr. Hay, our ambassador in London, inquired of the foreign office in London "whether there had been any modification of the Convention of 1888, which would go to place the non-signatory powers on any different footing from those signing the convention?"¹⁴ To which reply was made by Lord Salisbury that there had been none, and as a result in that war the canal was open to both belligerents, as had been the case in the Franco-German War of 1870, the Russo-Turkish War of 1877, and since in the Russo-Japanese War of 1904.

In discussing this question the expression neutralization of the Suez Canal is often used. The term neutralization is used with a varying meaning. Strictly speaking, if a waterway or territory is neutralized it would be closed to all belligerents, which is not the case with the Suez Canal. The term has, however, been expanded so as to include an arrangement where protection is guaranteed against hostile attack

¹⁴ Moore's Digest, pp. 262, 264-265, 266.

or defense with a common use of the waterway. This is the case with the Straits of Magellan. With respect to the neutralization of Belgium the use is forbidden by belligerents of its territory, and yet it has a right to protect its own territory, a right forbidden in its entirety both to the Suez Canal and the Straits of Magellan. A neutral port affords a limited use of its waters to all belligerents, and yet it fortifies and defends that port in case it is a belligerent in turn.' The latter status approaches in the opinion of the author that of the Panama Canal.

In May, 1877, M. de Lesseps made a proposition to the British Government for the neutralization of the Suez Canal, to which Lord Derby replied that the proposal was "open to so many objections of a political and practical character" that the British Government could not undertake to recommend it. Lord Granville, in 1885, instructed the British delegates to the Paris Commission "to avoid the use of the word 'neutrality' as applied to the canal, and to adhere to the term 'freedom' or 'free navigation.'"¹⁸ As a consequence of the above it may be said of the Suez Canal that it is a free and open canal in war and peace, limited by its possible occupation, but not disuse, for the defense of the home territory of Egypt.

The Corinth Canal is exclusively in Greek territory and under Greek jurisdiction.

128. Panama Canal.—As to the Panama Canal now under construction in the canal zone ceded to the United States for that purpose by the Republic of Panama, its status is different in many respects from that of any of the canals just mentioned. It is being constructed by the Government of the United States in territory originally foreign, now held in perpetuity, and will connect directly the two great oceans

¹⁸ H. S. Knapp, *Real Status of Panama Canal, etc.*, A. J. I. L., 4, No. 2.

of the world. In a military sense it is of the greatest importance to the United States, and is to her secondary only in its commercial value.

In an international or rather external sense the construction of the canal and its future use is governed now by two treaties, one between the United States and Great Britain, known as the Hay-Pauncefote Treaty of 1901, and the second between the United States and the Republic of Panama, known as the Hay-Bunau-Varilla Convention, concluded November 18, 1903, and proclaimed after ratification February 26, 1904.

129. Hay-Pauncefote Treaty.—The United States has, as a matter of policy, maintained of late years that one government only should construct the interoceanic canal, and by its treaty arrangement it has negotiated only with Great Britain to supersede the Clayton-Bulwer Treaty and the Republic of Panama to secure the necessary zone and rights across the Isthmus of Panama. The Hay-Pauncefote Treaty provides in the first article the agreement that this treaty should supersede the Clayton-Bulwer Treaty of 1850. In the second article it is agreed that the canal may be constructed under the auspices of the Government of the United States, and that subject to the provisions of the present treaty the said government should have all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

The next article, the third, being the most important, is given below in full. By comparison with the articles of the Convention of Constantinople of 1888, applicable to the Suez Canal, it will be seen that there are several matters stated which are of importance, and others that differ that are also significant.

Article III reads as follows:

The United States adopts, as the basis of the neutralization

of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople signed October 28, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war or war-like materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart

within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings and all work necessary to the construction, maintenance and operation of the canal shall be deemed to be part thereof, for the purpose of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal.

This treaty differs from both the Suez Canal Convention and the Clayton-Bulwer Treaty in that it does not forbid the erection or maintenance of fortifications. It differs from both also in that it does not provide for war between the contracting parties or between the United States and other powers, the dual guarantee by the Clayton-Bulwer Treaty becomes a single assumption by the United States. It does not provide for the association or adherence of other foreign powers in the treaty or guarantee.¹⁸

In Lord Lansdowne's memoir—discussing the points of difference between the first Hay-Pauncefote Treaty, which was not accepted by the Senate of the United States, and the draft of a second treaty, he says: "In my dispatch I pointed out the dangerous ambiguity of an instrument of which one clause permitted the adoption of defensive measures while another prohibited the erection of fortifications. It is most important that no doubt should exist as to the intention of the contracting parties. As to this, I understand that by the omission of all reference to the matter of defense the United States Government desires to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the

¹⁸ H. S. Knapp, *The Status of Panama Canal, etc.*, A. J. I. L., pp. 328-330.

hand of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from the principles of neutrality laid down by the rules. As to the first of these propositions, I am not prepared to deny that contingencies may arise when not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defense of the canal at a moment when they were themselves engaged in hostilities."¹⁷

130. Hay-Bunau-Varilla Treaty.—In the treaty with the Republic of Panama, commonly known as the Hay-Bunau-Varilla Treaty, which has been mentioned under the head of the Republic of Panama in a previous chapter, there is mention of subjects which are referred to in the preceding pages which treat of the Hay-Pauncefote Treaty.

In Article II Panama grants, not cedes, to the United States in perpetuity the use, occupation and control of a zone of land, and land under water, for the construction, maintenance, operation, sanitation and *protection* of said canal. There is a further grant in perpetuity of any other lands or waters outside of the zone described which may be necessary and convenient for the purpose just mentioned in the enterprise.

Article XVIII states that "the canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided by Section 1, Article III, of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901."

Article XXIII reads:

If it should become necessary at any time to employ armed

¹⁷ Moore's Digest, Vol. 3, p. 215.

forces for the safety or protection of the canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces, or to establish fortifications for these purposes.

Article XXV reads:

For the better performance of the engagements of this convention, and to the end of the efficient protection of the canal and the preservation of its neutrality, the Government of the Republic of Panama will sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific Coast and on the Western Caribbean Coast of the republic at certain points to be agreed upon with the President of the United States.¹²

The conditions of the two treaties quoted in regard to the Panama Canal are such as to provide for its free use in time of peace and in time of war by belligerents; it does not, however, include in these belligerents any state at war with the United States, as was done in the Suez Canal convention with respect to the Ottoman Empire. It practically puts the canal in the same status as a neutral port, so far as the use and stay of belligerent vessels are concerned. Such ports can be defended in time of a war in which they are concerned as a belligerent by fortification and defenses of various kinds duly prepared for such purposes in times of peace.

In regard to other maritime nations, besides Great Britain, there is a reference in Section 1 of Article III of the Hay-Pauncefote Treaty in the following terms: "The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules," etc. Hence, for non-observance of these rules, there can be an exclusion from the use of the canal, necessarily by the United States and, if required, by force.

¹² *Compilation of Treaties in Force, 1904, p. 609.*

In regard to canals in general, Moore says, "While a natural thoroughfare, although wholly within the dominion of a government, may be passed by commercial ships, of right, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases." (The Avon, 18 Int. Rev. Rec. 165.¹⁹)

¹⁹ Moore's Digest, Vol. 3, p. 268.

CHAPTER V.

NATIONALITY.—INTERCOURSE OF STATES.—RELATIONS BETWEEN THE NAVY AND DIPLOMATIC AND CONSULAR OFFICERS.—INTERNATIONAL FUNCTIONS OF NAVAL OFFICERS.—PROTECTION OF CITIZENS IN FOREIGN STATES.

131. Nationality the link between individuals and international law.—Oppenheim says, with respect to nationality as a link between international law and individuals, that “it is through the medium of their nationality only that individuals can enjoy benefits from the existence of the law of nations. This is a fact which has its consequences over the whole area of international law. Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a state they have no way of redress, there being no state which would be competent to take their case in hand. As far as the law of nations is concerned, apart from morality, there is no restriction whatever upon a state to abstain from maltreating to any extent such stateless individuals. On the other hand, if individuals who possess nationality are wronged abroad, it is their home state only and exclusively which has a right to ask for redress, and these individuals themselves have no such right. It is for this reason that the question of nationality is a very important one for the law of nations, and that individuals enjoy benefits from this law not as human beings but as subjects of such states as are members of the family of nations. And so distinct is the position of subjects of these members from the position of stateless individuals and from subjects of states outside the family of nations, th

it has been correctly characterized as a kind of international indigenouness.”¹

132. Right to protect citizens abroad.—The existence of nationality in an individual, which is generally termed citizenship, carries with it a right to protection from the home country, both as to the individual when abroad or as to his property abroad when he is at home.

133. Duty to receive expelled citizens.—There is a duty also on the part of the home state of receiving within its territory such of its citizens as are not permitted to remain abroad. These are generally paupers, idiots, habitual criminals, diseased persons and others likely to be detrimental to the state into which they have come. They may, however, be persons also expelled for political reasons.

134. Other rights of states with respect to citizens abroad.—In addition to the right and duty just mentioned with regard to citizens abroad the state has the right to tax its people abroad for its own purposes; it can require them to come home for military or other purposes, or can punish them for offenses committed abroad. On the other hand, a state cannot forcibly detain foreign citizens called home by their own state, or to prevent them from paying taxes to the state of their allegiance.

135. Nationality either natural or acquired.—Sir Alexander Cockburn, in speaking of the sources of nationality, says that “nationality or, in other words, the status of an individual as a subject or citizen in relations to a particular state, is either natural or acquired; natural, when it results from birth; acquired, when an individual is accepted as a subject or citizen by a state to which he did not originally belong. Nationality by birth or origin depends according to the law of some nations on the place of birth; according to that of

¹ Oppenheim, Vol. 1, p. 345.

others on the nationality of the parents without reference to the place of birth. In many countries both elements exist, one or the other predominating.”²

136. Citizenship regulated by municipal law.—It is the function of municipal or state law to define what constitutes a citizen or subject of a country. Citizenship denotes the possession within a particular state of full civil and political rights, subject to special disqualifications such as minority or sex.³ The Fourteenth Amendment to the Constitution of the United States defines citizenship of the United States as follows: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”

There are five methods, generally recognized by all states, for acquiring nationality through citizenship. They are:

1. By birth.
2. By naturalization.
3. By revolution.
4. By cession.
5. By subjugation.

The vast majority of those enjoying the citizenship of the various states acquire it by right of birth. Such citizenship by birth exists by reason of birth in a particular place or by reason of the nationality of the parents. There are certain exceptions to the general rule which may be noted, so far as the United States is concerned. The first is as to children of aliens who are born in the United States, but who return to the country of their parents. These parents were not, properly speaking, subject to the jurisdiction of the United States. This would also apply to the children of diplomatic officials serving temporarily in the United States. There has been

² Cockburn on Nationality, 1869.

³ Moore's Digest, Vol. 3, p. 273.

varying opinions and decisions as to the status of women of American birth and citizenship after marrying foreigners. On the whole it may be considered settled that if the laws of her husband's country makes her a citizen or subject of that country the United States concedes that status as settling the question of her citizenship. A change of citizenship may be made after birth by naturalization. In the case of a birth, however, in the United States of a child of parents who renounce their American citizenship and place themselves under the jurisdiction of their lately adopted country, the child has the right to elect his American citizenship.*

A person born on board of an American vessel of parents who are citizens of the United States, but who are at the time in a foreign country, having touched there in the course of a voyage, is to be regarded as a citizen of the United States. Section 1993 of the Revised Statutes of the United States provides further upon this subject that "all children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers have never resided in the United States." Notwithstanding this law children of alien parents born in the United States are ruled to be of American citizenship if they remain there.

As a rule illegitimate children take the nationality of their mother, but if they are born abroad of an American mother this does not apply.

It is conceded that an American-born woman who has lost her nationality by marrying an alien can revert to her original nationality by return to the United States.

137. Naturalization.—The second mode of acquiring citizenship is by naturalization. This in the United States is considered

* Moore's Digest, Vol. 3, p. 543, etc.

a judicial act which must be performed by the courts. The courts maintained by the ministers and consuls of the United States in countries where they exercise, by law and treaty, judicial powers, are not authorized to naturalize aliens.

138. Naturalization requirements of United States.—Under the Constitution of the United States the power to establish a uniform rule of naturalization is vested in Congress. By the laws enacted by Congress a person must declare on oath before a court two years at least before his admission, and after he has reached the age of eighteen years his intent to become a citizen. After five years of residence and within seven years of the first declaration he may obtain citizenship by taking an oath of allegiance to the United States and of renunciation of his former country.*

The result of naturalization is to make the person naturalized a citizen of the state with full claim to protection, and with political powers almost the same as a person native born. In the United States he lacks eligibility to the office of President of the United States.

139. As to Mongolians and American Indians.—White persons and persons of African descent are the only persons capable of naturalization in the United States. Chinese are expressly forbidden naturalization by law. Japanese, Burmese and Indians of American birth are not capable of naturalization.

140. Naturalization in countries with and without compulsory military service.—Between the United States and Great Britain the matter of double nationality is regulated by the convention of May 13, 1870, by which naturalization in either state is to be valid in all respects and for all purposes immediately upon its completion, but if the emigrant shall renew his residence in his old country he may be readmitted to his old nationality on his application and on such conditions as

* Sts. at Large, 590, 1 Gould *vs.* Tucker 513; 2 *idem* 202.

the readmitting government may impose, and shall not be further claimed by the other government.

In countries where there is compulsory military service the matter becomes more complicated, but in a general way the United States takes the ground that persons returning temporarily to their former state are protected against the exaction of what was at the time of emigration a future liability only, and that to lose protection the emigrant must have done that for which he might have been tried and punished at the moment of his departure.*

For British nationality colonial naturalization is as good as British naturalization.

141. As to the navy or marine corps.—An alien twenty-one years old or upwards who has enlisted in the United States Navy or Marine Corps, and has thereafter served five consecutive years in the navy, or one enlistment in the marine corps, may be admitted to citizenship without a previous declaration of intention.

A foreigner who has merely declared his intention to become an American citizen without having carried that intention into effect, is not an American citizen; he remains, until final naturalization, a subject or citizen of his origin. He is not entitled to a passport from the United States as a citizen. Naturalization cannot retro-actively affect a penalty imposed before the naturalization took place.

The children of persons who have been duly naturalized under the laws of the United States, being under age at the time of the naturalization of their parents, shall, if living in the United States, be considered as citizens thereof.†

In Russia a law exists by which a subject of Russia who renounces his allegiance and becomes a citizen of another coun-

* Westlake, Vol. 1, pp. 224, 228.

† Act of July 26, 1894, 28 Stats. 123, 124.

try without permission of his government is subject to perpetual banishment from the empire, or in case of voluntary return to deportation to Siberia. Turkey forbids naturalization without the consent of its government.

In regard to passports as *prima facie* evidence of the statements contained therein, Secretary Foster, in the case of Goldstein, a naturalized citizen of the United States, wrote that "it is the just expectation of this government that its passports will be duly respected abroad as *prima facie* evidence of the facts therein stated, and that its validity is only to be traversed by competent proof."*

As an example of the acquisition of citizenship by revolution or successful insurrection we have the provision of the Treaty of 1783 acknowledging the independence of the United States, in which it is provided that all persons, whether born in the United States or otherwise, who adhered to the United States, were absolved from their allegiance to Great Britain, while those who adhered to Great Britain were British subjects. For an example of collective naturalization we have the cases of Russian subjects affected by the cession of Alaska and persons affected by subjugation of Alsace and Lorraine. The general rule given in an opinion of Chief Justice Fuller is authoritative that "the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided."*

The proper evidence of individual naturalization performed before a court is the judicial record, or an exemplified copy of it, and parole evidence is admissible only in case of the loss or destruction of such record."¹⁰

* Moore's Digest, Vol. 3, p. 987.

* Moore's Digest, Vol. 3, p. 311.

¹⁰ Moore's Digest, Vol. 3, p. 493.

142. Corporations as citizens.—Corporations, under the treaties between the United States and Great Britain of 1783 and 1794, are entitled, in respect of security for their property, to the same rights as natural persons. The Board of Harbor Works of Ponce, Porto Rico, a Spanish corporation, became, “as between the United States and other governments, an American citizen,” by virtue of the treaty of peace by which Porto Rico was annexed to the United States.¹¹

143. Passports.—A passport is the usual evidence of nationality in foreign countries. It is generally issued by the state, or one of its authorized agents, as a certificate that the person described therein is a citizen or subject of the country and requests permission for him to travel and remain, as well as to have all proper aid and protection.

The rule of the United States is that a new passport is to be taken out by every person whenever he or she may leave the United States, and every passport must be renewed, either at the State Department or at an embassy, legation or consulate abroad, within one year from its date. Passports at home or abroad can only be issued to citizens of the United States or to persons loyal residents of an insular possession of the United States.¹² A husband and wife and minor children can be included in one passport if they travel together. Neither official nor professional titles nor statements of the holder's business or occupation are inserted in the passports granted by the Government of the United States.

The Secretary of State has the right, in his discretion, to refuse to issue a passport, and will exercise this right towards any one whom he has reason to believe desires a passport to further an unlawful or improper purpose.¹³

¹¹ Moore's Digest, Vol. 3, pp. 802, 804.

¹² Rules Granting Passports in the United States, 1903. See also p. 138.

¹³ By act of 1907 persons can under some qualifications receive a passport for six months if they have taken out a declaration of intention to become a citizen of the United States.

“Some foreign countries, before recognizing the validity of a passport, require that a *visa* or *visé* shall be, or shall have been, affixed to it. This is an endorsement denoting that the passport has been examined and is authentic, and that the bearer may be permitted to proceed on his journey. Sometimes it is required that the *visa* be affixed in the country where the passport is issued by a diplomatic or consular officer of the government requiring it; sometimes simply by such officer anywhere; sometimes at the frontier of the country to which admission is sought. It may even be required from a diplomatic or consular officer of the government which issued the passport.”¹⁴

The naturalization treaties and conventions and decisions existing between the United States and different countries will be found in the existing laws and treaties of the United States, though some questions of double allegiance and lost nationality without the attainment of another are yet unsettled with us.

144. Intercourse between States.—A state cannot be a member of the family of nations if it has no provisions for intercourse with all or most of the other states. The right of legation, or the right of a state to send and receive diplomatic envoys, and the right of protection of citizens in foreign countries, are rights which every state possesses, and are rights which are held in consequence and interest of international intercourse. The growth of that intercourse in modern times by land and sea, by mail and telegraph, is too evident to need other than bare mention.

When a state has an individual head he is to be considered as a representative, or rather embodiment, of the sovereignty of the state, and he is entitled as a consequence to respectful personal consideration from the other states of the family of

¹⁴Hunt's American Passports, p. 5.

nations and from their representatives. As the object of this consideration is to express the respect due to a sovereign state, any intentional omission to comply with the customary and proper observances must be regarded as an affront to the state, which it has a right to resent.

The chief agent or minister of a state in its international relations, within its borders, is the person to whom the management of external or foreign affairs is committed. This person in the United States is the Secretary, in the Cabinet, who is at the head of the Department of State, who is officially known as the Secretary of State.

Subordinate to the Secretary of State are other officers and agents, resident in foreign countries, who represent the state in a public capacity, and are known as diplomatic or consular officials.¹⁵

145. Diplomatic agents.—"For the sake of convenience and uniformity in determining the relative rank and precedence of diplomatic representatives, the Department of State has adopted and prescribed the seven rules of the Congress of Vienna, found in the protocol of the session of March 9, 1815, and the supplementary or eighth rule of the Congress of Aix-la-Chapelle of November 21, 1878."

They are as follows:

146. Rules of Congress of Vienna.—"In order to prevent the inconveniences which have frequently occurred, and which might again rise from claims of precedence among different diplomatic agents, the plenipotentiaries of the powers who signed the Treaty of Paris have agreed on the following articles, and they think it their duty to invite the plenipotentiaries of other crowned heads to adopt the same regulations:

"Art. I. Diplomatic agents are divided into three classes: That of ambassadors, legates or nuncios; that of envoys, min-

¹⁵ F. Snow, ed. by Stockton, p. 58.

isters or other persons accredited to sovereigns; that of *chargés d'affaires* accredited to ministers for foreign affairs.

"Art. II. Ambassadors, legates or nuncios only have the representative character.

"Art. III. Diplomatic agents on an extraordinary mission have not, on that account, any superiority of rank.

"Art. IV. Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representative of the Pope.

"Art. V. A uniform mode shall be determined in each state for the reception of diplomatic agents of each class.

"Art. VI. Relations of consanguinity or of family alliance between courts confer no precedent on their diplomatic agents. The same rule also applies to political alliances.

"Art. VII. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers.

"Art. VIII. It is agreed that ministers resident accredited to them shall form, with respect to their precedence, an intermediate class between ministers of the second class and *chargés d'affaires*."

147. Grade of diplomatic representatives.—"The diplomatic representatives of the United States are of the first, the second, the intermediate and the third classes, as follows:

"(a) Ambassadors extraordinary and plenipotentiary.

"(b) Envoys extraordinary and ministers plenipotentiary, and special commissioners, when styled as having the rank of envoy extraordinary and ministers plenipotentiary.

"(c) Ministers resident.

"These grades of representatives are accredited by the President.

“(d) *Chargés d'affaires*, commissioned by the President as such, and accredited by the Secretary of State to those ministers for foreign affairs of the government to which they are sent.

“In the absence of the head of the mission the Secretary acts *ex officio* as *chargé d'affaires ad interim*, and needs no special letter of credence. In the absence, however, of a Secretary and second secretary, the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs.”

148. Superadded consular office.—“When the office of consul-general is added to that of envoy extraordinary and minister plenipotentiary, minister resident, *chargé d'affaires* or secretary of legation, the diplomatic rank is considered as superior to and independent of the consular rank. The official will follow the consular regulations in regard to his consular duties and official accounts, keeping correspondence in one capacity separate from correspondence in the other.”¹⁸

149. Military and naval attachés.—In addition to the above diplomatic officials, the more important embassies and legations have military and naval attachés. These attachés rank next to and after the first secretaries of the embassy and legations, as these latter may become *ex officio* *chargés d'affaires* in the absence of the head of the mission. Among themselves they rank as they would do when engaged in any joint service.

150. Agents as *persona non grata*.—A state may refuse to receive an ambassador on special grounds, and may also be unwilling to receive one of its own citizens as an ambassador of a foreign state, and a person appointed as diplomatic agent may be for various reasons or causes refused as a *persona non grata*. A diplomatic agent of any grade may also be dismissed if for any reason he becomes a *persona non grata*. It is

¹⁸ Instructions to Diplomatic Officers, Par. 18-20.

usual with some states or with respect to some grades to send the name of the proposed appointee to the government of the state to which he is to be appointed in order that objections, if any exist, may be made before the appointment.

151. Honors to diplomatic officers by the navy.—The regulations of the United States Navy provide for the proper honors, salutes and distinctions for officials in the diplomatic service of the United States in their official visits to ships that are within the waters of the nations to which they are accredited.

It is required by the navy regulations referring to the commander-in-chief of a fleet or squadron, the senior officer or the commander of a vessel acting singly, that

1642. (1) He shall preserve, so far as possible, the most cordial relations with the diplomatic and consular representatives of the United States in foreign countries and extend to them the honors, salutes, and other official courtesies to which they are entitled by these regulations.

(2) He shall carefully and duly consider any request for service or other communication from any such representative.

(3) Although due weight should be given to the opinions and advice of such representatives, a commanding officer is solely and entirely responsible to his own immediate superior for all official acts in the administration of his command.

1643. He shall, as a general rule, when in foreign ports, communicate with local civil officials and foreign diplomatic and consular authorities through the diplomatic or consular representatives of the United States on the spot.

1644. In the absence of a diplomatic or consular officer of the United States at a foreign port he has authority:—

(a) To exercise the powers of a consul in relation to mariners of the United States (Sec. 1433, R. S.);

(b) To communicate or remonstrate with foreign civil authorities as may be necessary;

(c) To urge upon citizens of the United States the necessity of abstaining from participation in political controversies or violation of the laws of neutrality.

1533. If any officer of the navy accepts or holds an appointment in the diplomatic or consular service of the government, he will be considered as having resigned his place in the navy, and it shall be filled as a vacancy. (Sec. 1440, R. S.)¹⁷

152. Consular officer.—A consul is a public functionary named by one state to act, with the consent of the receiving state, in its jurisdiction and domain. He has for his mission the supervision and protection, in conformity with the special treaties existing between the two states, and with the principles of international law, of the individual and national interests of his country and countrymen in accordance with the regulations of his government. He fulfils many functions to his nation which cannot be enumerated by law or regulation. He may not, however, discharge functions contrary to the law of the receiving state or the terms of the consent of this state shown in the *exequatur*. To entitle consuls to be admitted and recognized as such they must present their commissions, on the production of which they will receive their *exequatur* from the receiving state, without which they cannot serve in their official position. By the act of 1856 a consul of the United States cannot exercise diplomatic functions without special authority from the President. Consuls made *chargés d'affaires* become invested with diplomatic privileges as *chargés d'affaires*, not as consuls, and such application of functions does not change the legal status of consuls.¹⁸ Consuls have no judicial powers under ordinary circumstances.¹⁹

¹⁷ U. S. Navy Regulations, 1913.

¹⁸ E. Stowell, *Le Consul*.

¹⁹ Stowell's *Consular Cases*.

The consular service of the United States consists of the following grades:

Consuls-general, five of whom are consuls-general-at-large, to serve as inspectors of consulates; consuls; vice-consuls; consular agents; interpreters, and student interpreters.

153. Vice-consular officers.—Vice-consular officers are consular officers who shall be substituted temporarily to fill the place of consuls when they shall be temporarily absent or relieved from duty. They have, accordingly, no functions or powers when the principal officer is present at his post, but their functions are co-extensive with his when he is absent from his district, and in all cases where they are lawfully in charge of the office.”

154. Consular agents.—Consular agents are consular officers subordinate to their principals, exercising the powers and performing the duties within the limits of their consular agencies, but at ports or places different from those at which their principals are located. Their functions are not, in all respects, as extensive as those of the principal office. Though they act at places different from the seat of the principal office, and their duties are in substance the same toward persons desiring consular services, they act only as the representative of the principal, and are subject and subordinate to him.”

155. Consular officers in Eastern countries.—In non-Christian countries the rights of extraterritoriality have been largely preserved, and have generally been confirmed by treaties to consular officers. To a great degree they enjoy the immunities of diplomatic representatives, together with certain prerogatives of jurisdiction, the right of worship, and, to some extent, the right of asylum. These immunities extend to exemption from both the civil and criminal jurisdiction of

” Consular Regs. of U. S.

the country to which they are sent, and protect their households and the effects covered by the consular residence. Their personal property is exempt from taxation, though it may be otherwise with real estate or movables not connected with the consulate. Generally, they are exempt from all personal impositions that arise from the character or quality of a subject or citizen of the country."

A consul in any country may claim inviolability for the archives and official property of his office, and their exemption from seizure or examination, but he is protected from the billeting of soldiers in the consular residence. He may also place the arms of his government over his door. Permission to display the national flag is not a matter of right, though it is usually accorded and often provided for by treaty."

156. Notification of arrival of men-of-war and interchange of visits with diplomatic and consular officers.—Art. 1273. Upon arrival in a foreign port where there are diplomatic or consular officers of the United States, the following rules in regard to visits of ceremony shall be observed by officers of the Navy:

(a) A flag officer or commodore shall pay the first visit to a diplomatic officer of or above the rank of *chargé d'affaires*. He will receive the first visit from consular officers.²¹

(b) A commanding officer shall pay the first visit to a diplomatic officer of or above the rank of *chargé d'affaires* and to a consul-general. He will receive the first visit from other consular officers. (Art. 66, par. 3.)

(c) Diplomatic and consular officers in charge of legations or consulates shall be notified of the arrival of the ship in port.

²¹ A consul-general, counsellor, or secretary of the Embassy ranks next after a commodore in the Navy.

(d) The senior officer present, when notified, shall, if necessary, arrange to furnish a suitable boat to enable a diplomatic or consular officer to pay official visits afloat. A commanding officer shall, when notifying these officials of his arrival, offer them a passage to the ship at such time as they may select.²²

157. Other duties of consuls.—"The jurisdiction allowed to consuls in civilized countries over disputes between their countrymen is voluntary and in the nature of arbitration, and it relates more especially to matters of trade and commerce." A consul in an enemy's country has no authority by virtue of his office to grant a license or permit which will have the effect of exempting a vessel of the enemy from capture and confiscation.²³ In a neutral country he has no authority by virtue of his office to grant a license or permit to a vessel to exempt it from belligerent capture by the naval forces of his own country for attempting to enter a blockaded port.²⁴

In general, a consul has the same authority to perform notarial acts for which a notary public is competent. His authority of that nature also includes the authentication of documents, administration of estates and certain representations of private interests.

Exclusive jurisdiction over disputes between masters, officers and crews of the vessels of their respective countries is conferred on consuls by various treaties between the United States and other powers.

The right to reclaim deserting seamen also is often so conferred. By other treaties, consuls are empowered to adjust

²² Navy Regs. of U. S., 1913.

²³ Rogers *vs.* Amudo and Newberry Com., 400.

²⁴ The Benito Estenger, 176 U. S. 568; 20 Stat. 489.

damages suffered at sea and to act in matters of wreck and salvage."

Seamen of the merchant marine of the United States are entitled to relief from a consul, but this does not include seamen discharged or deserting from naval vessels of the United States. Seamen on American yachts are regarded as coming within the meaning of seamen of the merchant service." Porto Ricans and inhabitants of the Philippine Islands and Guam come under the protection of consuls, and while serving as seamen come within the provisions for relief of destitute seamen.

158. Protection of citizens abroad.—Any state has theoretically the right to exclude all foreigners if it so chooses from its territory. It is, however, a right which is practically impossible to enforce and an attempt at such exclusion would be a violation of the spirit of international law and of the friendly intercourse existing within the family of nations.

The right, however, is partially exercised by excluding objectionable foreigners or permitting them to come under certain restrictions. The United States, for instance, restricts the entrance into its territory of certain classes of Chinese subjects, as well as forbids criminals and paupers and other objectionable foreigners of all countries an entrance into their domain. Russia, on the other hand, does not admit foreigners without passports, and those who are of the Jewish religion have to submit to special restrictions.

"With his entrance into a state, a foreigner," says Oppenheim, "unless he belongs to the class who enjoy so-called extraterritoriality, falls at once under such state's territorial supremacy, although he remains at the same time under the personal supremacy of his home state. Such foreigner is

²Consular Regulations, pp. 34-35.

therefore under the jurisdiction of the state in which he stays, and is responsible to such state for all acts he commits on its territory. He is further subjected to all administrative arrangements of such state which concern the very locality where the foreigner is." "

It is a recognized rule, on the other hand, that every state possesses a right of protection over its subjects or citizens abroad. With this right goes the corresponding duty on the part of every state to treat foreigners within its limits with the same consideration and protection of his person and property that is due to its own subjects. It can make certain discriminations, as we have already seen, but as to the persons and property of foreigners the safety of both are to be held before the law upon the same plane as its citizens. But, notwithstanding claims made to the contrary of late years, they are not entitled to any privileged treatment. As Baty says, a claim is virtually made that "they are to be treated, it seems, not only after the fashion of the nation which receives them, but after some average standard to which it is expected to conform. This is new doctrine. It is not often laid down in set terms. But it is none the less a working force. The result of it, were it to receive definite recognition, would be nothing less than to disestablish states as we know them. Whenever a community desired to live in a fashion which did not commend itself to its neighbors it would be confronted by the necessity of leaving out of the scope of its activity this solid mass of undigested and indigestible foreigners. It cannot bring them into line with its own subjects; it cannot ask them to go. They remain a privileged excrescence, a splinter in the body politic, a standing defiance to the law, a perpetual challenge to the native." "

" Oppenheim, Vol. 1, p. 374.

" Baty, Int. Law, p. 25.

We must then accept the conclusion that no foreigner, transient or settled, can expect any treatment more favorable than a citizen or subject can expect in the same country. If this is not as favorable to the foreigner as he would like, or similar to what he would receive in his own country, he must realize that a person going into a foreign country accepts the risks of his own action as well as the laws and customs of the country. "This principle," as Secretary Marcy said, "does not at all interfere with the right of any state to protect its citizens when abroad from wrongs and injuries, from arbitrary acts of oppression or deprivation of property, as contradistinguished from penalties incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves." "

159. Conclusions of the Institute of International Law upon the question of redress.—The question of redress is apt to come up more frequently in the case of riots, insurrections and civil wars. Here we may have some guidance from the conclusions of the Institute of International Law at its meeting at Neufchatel in 1900, which found a right to damages: "(1) When the violence is directed against the complainants in their quality of foreigners, (2) when the violence consists in closing a port to exit or entry without notice, (3) when the violence is the illegal act of an administrative authority (even of an insurrectionary authority), and (4) when an act is contrary to the laws of war."

I will quote here some instructions from our government, and also other references of interest bearing upon the subject. Secretary Forsythe, in instructing our chargé d'affaires to Brazil in 1835, said: "It is the wish of the President that you should make use of your official interposition upon those occasions only when, after a careful examination of the complaint, you shall be satisfied that wrong has been done in

contravention either of the treaty or of public law. By carefully restricting your applications for redress to cases of this disposition, by abstaining from interference in all doubtful cases, the probability of your obtaining prompt and ample justice will be much increased. You will also inculcate upon your countrymen the necessity of a proper respect for the established laws, decrees and usages, the stipulations of Brazil in the treaty to protect citizens of the United States, being subject to that condition. Naval officers cannot expect to be exempted from the operation of this rule, and they should conform to all the Brazilian fiscal and sanitary regulations. In regard to diplomatic agents, the twenty-seventh article of the treaty declares that those of the United States in Brazil can claim such immunities only as that empire may choose to extend to the representatives of other powers.”²²

160. As to religious tests against Americans.—“Some states,” said Mr. Hay in 1902, “few in number be it said, make distinction between different classes of citizens of the foreign state, denying to some (e. g., Hebrews) the rights of innocent intercourse and commerce which by comity and natural right are accorded to the stranger, and doing this without regard to the origin of the persons adversely affected.

“This government can lose no opportunity to controvert such a distinction, wherever it may appear. It can admit no such discrimination among its own citizens and can never assent that a foreign state, of its volition, can apply a religious test to debar any American citizen from the favor due to all.”²³

Besides paupers, criminals and undesirable persons for moral or physical reasons, the immigration laws of 1907 of

²² Moore's Digest, Vol. 3, p. 249.

²³ Moore's Digest, Vol. IV, p. 4.

the United States forbid the entry of contract laborers or anarchists.

161. United States Act of 1907 in regard to expatriation of citizens and their protection abroad.—By an act in reference to the expatriation of citizens and their protection abroad, approved March 2, 1907, it is provided that passports can be issued for six months, without renewal, to persons not citizens of the United States, entitling them to the protection of the government in any foreign country, except the country in which he was a citizen before making his declaration of an intention to become a citizen of the United States. A residence of three years in the United States is also necessary.

162. Expatriation.—Any American citizen is deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. When any naturalized citizen of the United States shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years. Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe. No American citizen is allowed to expatriate himself when his country is at war.*

163. Protégés and de facto citizens.—There are at least two occasions when persons not citizens may come under the protection of a state abroad. The first is when, by international agreement or for reasons of humanity, a state or its diplomatic or naval agents abroad undertake or assume this

* Act of Congress Ap., March 2, 1907.

protection. Agreements of a permanent nature may be made by a small nation, like Switzerland, or in case of a war of a temporary nature by neutral diplomatic agents in behalf of belligerent subjects in an enemy's country, like the position assumed by the American minister in Paris towards German subjects in the Franco-German War. In these cases the protected persons are known as *protegés*.

Instances of naval protection afforded to other citizens by our naval vessels in uncivilized and weak communities has been frequent in times past in the Orient, and in the Straits of Magellan in case of a penal revolt, and also in 1877 on the occasion of a negro insurrection at Santa Cruz in the West Indies.

It may happen also that a state promises diplomatic protection in certain Oriental countries to natives in the service of embassies or consulates. Such natives are known as *de facto* subjects of the protecting states. This position of protection is anomalous, but authorized by the treaty of 1880 with Morocco, of which the United States was a participant.²²

164. Protection of citizens abroad by naval commanders.—By the Naval Regulations of the United States the following is enjoined upon officers of the Navy in command:

Art. 1633. "During a war between civilized nations with which the United States is at peace, he and all under his command, shall observe the laws of neutrality and respect a lawful blockade, but at the same time make every possible effort that is consistent with the rules of international law to preserve and protect the lives and property of citizens of the United States wherever situated."

Art. 1646. "On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, he shall

²² Moore's Digest, Vol. II, pp. 735-749.

consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof."

Art. 1647. "The use of force against a foreign and friendly state, or against anyone within the territories thereof, is illegal. The right of self-preservation, however, is a right which belongs to states as well as to individuals, and in the case of states it includes the protection of the state, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the state or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation cannot be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance. In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined. It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed." ²²

Art. 1648. "Whenever, in the application of the above-mentioned principles, it shall become necessary to land an armed force in foreign territory on occasions of political disturbance, where the local authorities are unable to give adequate protection to life and property, the assent of such authorities, or of some one of them, shall first be obtained, if it can be done without prejudice to the interests involved."

²² Navy Regs., 1913.

Art. 1650. "So far as lies within their power, commanders-in-chief and captains of ships shall protect all merchant vessels of the United States in lawful occupations, and advance the commercial interests of this country, always acting in accordance with international law and treaty obligations."*

165. Classification of states with regard to stability and protection afforded.—All states, with respect to their character or institutions, may be divided into three general classes: (1) Stable, (2) weak, (3) semi-civilized or barbarous.

In the case of states possessing stable institutions, and whose courts are always ready and open for hearings or trials for the purpose of affording redress for the injuries of individuals, all that is ordinarily done is to call the attention of the government of the state through the usual diplomatic channels, to any seeming failure of justice in respect to citizens abroad, and if a dispute follows it is settled diplomatically by arbitration or in extreme cases by war.

166. Case of the "Baltimore."—A case in an ordinary stable country was that of mob violence towards the crew of the U. S. S. "Baltimore" in Valparaiso, Chile, on October 16, 1891. A considerable number of the men of the "Baltimore" being on leave and unarmed on shore in the city were assaulted by armed men nearly simultaneously in different localities in the city. One petty officer was killed and another died from his injuries, while seven or eight of the seamen were seriously injured.

The ground taken by the United States in this matter was:

First. That the attack was one upon the men because they wore the uniform of the United States Navy, and as a feeling of hostility to the United States, and not from any action upon the part of our men.

* U. S. Navy Regs., 1913.

Second. That the authorities of Valparaiso failed in their duty in not giving police protection to the attacked men, which offense was aggravated by the fact that some of the police of the city, as well as some Chilean sailors and soldiers, joined in the attack."

The Chilean Government entered a general denial of hostile intent against the United States, and quoted the following from a dispatch from our Secretary of State in connection with riots against Italian subjects within our territory. The dispatch was to the Marquis Imperiali, under date of May 21, 1891, and the words quoted were as follows: "There is no government, however civilized it may be, however great may be the vigilance displayed by its police, however severe its criminal code may be, and however speedy and inflexible may be its administration of justice, that can guarantee its own citizens against violence growing out of individual malice or a sudden popular tumult."

With regard to such cases in general Vattel also says that: "It would be unjust to impute to the nation all the faults of its citizens. In general, it cannot be said that one has received an injury from a nation because some of its members have injured him."

The vital question of international law involved in the "Baltimore" case was, however, whether the Chilean Government took proper or sufficient measures to prevent the attack and to bring the offenders to punishment. This was a question of fact which our government had to decide for itself according to all the evidence in its possession, and it decided that the Government of Chile had not done all that it should have done to prevent the attack and to punish the offenders."

"Moore's Digest, p. 854, etc.

"Snow's Int. Law, ed. by Stockton, p. 54.

With respect to the second class of states, that is weak states with unstable governments, it at times occurs that citizens abroad must be protected at once, not by diplomatic representation; there is no time for that, but by the employment of naval force.

Under these circumstances whenever civil disturbances occur, it is usual for powers to send a naval force to the place of the troubles or threatened commotion for the purpose of affording protection or asylum to the citizens that may be there domiciled. In those cases the regulations of the Navy already quoted must be followed so far as they can apply. The responsibility for any action taken by a naval force, rests wholly upon the commanding officer thereof, after due consultation with the diplomatic or consular officer upon the spot.

At times the mere appearance of a naval force, accompanied by a firm attitude on the part of the officer in command, will prevent the resort to active measures. A display of force is sometimes ordered by Congress or by the President of the United States.

It happens at times that the commanding officer of a naval force is required by circumstances or request to protect the citizens of other countries than his own. Instances of this kind have occurred of late years, for example, in the protection afforded by British men-of-war in Alaska at the time of a threatened Indian uprising, and by our own vessels on the Isthmus of Panama and at Bluefields in Nicaragua.

As to the third class of governments, such as are ordinarily classed as semi-civilized or barbarous, intervention by force in behalf of citizens domiciled or sojourning there is a more common matter. In these countries the employment of naval forces is the principal means of such protection, added thereto at times by the landing of military detachments.

CHAPTER VI.

TREATIES.—AMICABLE SETTLEMENT OF DISPUTES.— MEASURES SHORT OF WAR.

167. Treaties.*—By the regulations of the Navy of the United States a senior naval officer when abroad is directed to guard against any actual or threatened violation of the principles of international law or *treaty rights* to the injury of the United States or its citizens on the part of foreign authorities. The responsibility for any action taken by a naval force rests solely upon the commanding officer thereof. It is hence desirable that when on a foreign station the commanding officers, and those likely to be in command, should make themselves familiar with the treaties with the countries within the limits of their station.

Treaties are not international law, but as contracts between nations, treaties are subject to a certain extent to the rules of international law. A treaty which is in any of its parts a direct violation of a well-known fundamental rule of international law is not binding upon the parties concerned or third parties. A treaty, for example, which establishes jurisdiction over the high seas, or militates against the equality of sovereign states, would be void and of no effect. Treaties do not make international law, but they do show tendencies which may eventually become accepted rules. When changes become well established it is not necessary to have treaty conditions upon the point.

Treaties, as distinguished from conventions, protocols and declarations, are of primary importance, stipulating, as they generally do concerning political or large commercial sub-

* The volumes containing the treaties in force of the United States will be found in the libraries of the various ships of the U. S. Navy.

jects. Conventions generally concern specific matters of minor importance. Protocol, a word generally used to describe the daily minutes of a conference, is sometimes used as the name of a brief agreement or convention of binding force. Declaration is used often as an enunciation of a general doctrine or principles which shall be binding upon the assenting parties, like the Declaration of Paris, and of London.

The right to make treaties is included in the fundamental rights of a sovereign state. It can be exercised also in a part-sovereign state, like Egypt, to the extent permitted by the suzerain power.

The treaty-making power of a state is in the hands of its ruler, subject to more or less restriction, as the constitution of the state provides. With us, for example, the President can only conclude treaties with the advice and consent of the Senate. To make a treaty financially effective the House of Representatives is also called upon to act.

As commander-in-chief the President can, acting alone, in the exercise of his military powers, conclude armistices and arrange conventions with an enemy. So also can the commander-in-chief of an army or of a naval force. These latter are, however, subject to review by the President, and, as in the case of General Sherman in North Carolina during the Civil War, subject to disapproval and disavowal.

The Constitution of the United States provides that all treaties made under the authority of the United States shall be the supreme law of the land, and that the judges in every state shall be bound thereby, anything in the constitution and laws of any state of the Union to the contrary notwithstanding.

A treaty is not binding, of course, until it is duly ratified by the proper authorities of each state. Unless otherwise provided the treaty, however, goes into effect from the date of its signature.

The question of the interpretation of treaties is one that has given rise to many disputes in our country, as well as in others of greater age. Sentences, phrases and words have become the object of much wrangling. T. J. Lawrence says upon this subject that "we can hardly venture to go beyond the statements that ordinary words must be taken in an ordinary sense, and technical words in a technical sense, and that doubtful sentences and expressions should be interpreted by the context so as to make the treaty homogeneous and not self-contradictory. But when states get into controversy about the interpretation of a treaty they often make a new agreement, clearing up the disputed points in the way that seems most convenient at the time, which is not always the way pointed out by the strict rules of interpretation."¹

In regard to the order of the execution of a treaty, it is generally considered that the special provisions take precedence over the general provisions, and other things being equal, that the more important matters take precedence over the less important.

When two treaties made between the same states at different times conflict, the later treaty governs, it being made or is supposed to be made in substitution for the former treaty.

When two treaties conflict which have been made with different states at different dates, the earlier treaty governs, it being unfair to violate an engagement made with one party by a later agreement made with another party without the consent of the first. (Russia and Treaty of San Stefano, 1878, vs. Treaty of Paris, 1856.)

168. Perpetual treaties.—The question of continuous obligations of treaties, especially of treaties of long or perpetual duration, has been one extensively discussed by publicists and statesmen. The Clayton-Bulwer treaty made between the

¹ Lawrence's *Principles of Int. Law*, p. 287, 3d edn.

United States and Great Britain, which was a perpetual one, causing long and acrimonious discussion, is an example of the bad nature of perpetual treaties. Two schools of publicists have gradually formed as to the binding force of perpetual treaties. One school would have the obligations of treaties enforced as strictly as the letter of municipal law, and urges that no treaty should be abrogated without the consent of all the parties concerned; the other school, which may be termed the continental school, urges that there may arrive a time in a nation's history when, by the nature of a treaty or the changed condition of affairs, a state is justified in refusing to be longer held by a treaty. The dispute has been termed as *Law vs. Progress*. Sir Henry Maine says: "In the case of progressive societies it may be laid down that social necessities and social opinion are always more or less in advance of law. Law is stable, society is progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed." To my mind, a conservative modification of perpetual treaties when outgrown should be made. If an iron-bound refusal is met with then the abrogation of the treaty should follow.

The Treaty of Vienna made in 1815 was violated when in 1860 Italy was unified. In the same way the consolidation of Germany in 1866 would have been stopped on account of the opposition of some of the minor German states. As to the setting aside of the Treaty of Berlin by Austria, with respect to Bosnia and Herzegovina in 1909, this is a matter of too recent knowledge to require more than a reference.

A recent writer well says, in closing a discussion upon this subject, that "each case has circumstances that are peculiar to it, and we must judge it on its own merits, bearing in mind on the one hand that good faith is a duty incumbent on states as well as individuals, and on the other that no age can be r

wise and good as to make its treaties the rule for all succeeding time.”³

169. Measures short of war.—The modes of putting stress upon an offending state which may be of a forcible nature, though short of actual war, can be classified under two general heads of retorsions and reprisals.

170. Retorsions.—Retorsions are retaliations in kind. They are always unfriendly, though they may not always be forcible or warlike. If a state is wanting in courtesy or friendship, if it has placed discriminating duties or restrictions upon intercourse, or if it has given any specific cause for offense by certain conduct, then the injured state can adopt a similar line of conduct in order to bring both the offending state to a sense of propriety and justice or to prevent a repetition of the offense.

171. Reprisals.—Reprisals are sometimes known as *general reprisals* to distinguish them from special acts done in the course of regular warfare and in accordance with the laws of war.

The following acts of general reprisal done without the existence of intention of war may be considered as having the sanction of usage and of sufficient authority:

1. The sequestration or seizure of the property of the offending state.

2. The sequestration or seizure of the property of citizens of the offending state.

3. Suspension, partial or complete, of commercial or other intercourse between the two nations.

4. Suspension or annulment of treaties in part or in whole.

5. Withdrawal of all privileges and rights to domiciled citizens of the offending state.

6. A pacific blockade.

³ T. J. Lawrence Principles of Int. Law, 3d edn., p. 289.

7. Partial or temporary occupation of territory.

172.1. Sequestration.—The sequestration or seizure of property belonging to the offending state has been more than once threatened and actually enforced. Great Britain in 1849, in the *Don Pacifico* case, enforced an embargo upon Greek shipping and seized several Greek ships of war in the Pireus.

In 1895 Great Britain, having been unable to secure the required redress and indemnity from Nicaragua for the expulsion of the British vice-consul and other British subjects and their property from Bluefields and the Mosquito reservation, sent a naval force to Corinto, a Pacific port of Nicaragua, and gave an ultimatum that unless the indemnity was paid in three days Corinto would be occupied by the British forces. Proper response not having been made a force was landed and the custom house and public offices of Corinto occupied. Ultimately, the Government of Nicaragua agreed to pay the indemnity within fifteen days after the evacuation of Corinto by the English forces, the payment of the same being guaranteed by the Government of Salvador. The fleet left on May 5, 1895, the public property of Nicaragua being in its possession during the occupation.

As to (2) the sequestration of the property of citizens of the offending state this is exemplified by the action of Great Britain in 1861 in the seizure of Brazilian merchant vessels, and in 1872 by that of Germany by the seizure of Haitian merchant vessels.

173.3. Embargo.—As to embargo or suspension of intercourse between two nations, a practical example of this occurred in our own history in 1807, after the "*Chesapeake*" affair, it being further directed that all English men-of-war should be denied our ports. Great Britain apologized for this affair and offered indemnity for the victims.

174.4. Suspension of treaties.—In 1798, at the time of the quasi-war with France, the United States annulled its treat

with France and directed the seizure of armed French vessels in certain portions of the world.

175.5. Withdrawal of privileges to aliens.—This is rarely done, but is within the power of states in times of peace.

176.6. Pacific blockade.—As to pacific blockade there are numerous cases arising of this species of reprisal or application of force.

The latest cases are of the Greek ports in 1850 by England, that of Formosan ports by France in 1884, of the Greek ports by the Allied Powers in 1886, of the coast of Siam by France in 1893, the blockade of Crete in 1897 by the Allied Powers, and of the blockades of Venezuelan ports during the régime of Castro.

The increasing tendency to use the powerful argument of a pacific blockade to coerce a nation as a step short of war is somewhat due to the combination of the six great powers of Europe, with a view of keeping matters quiet in the Levant for fear of a general European war.

The legal position of a pacific blockade is unsettled, as the attitude of the blockaders towards vessels of states not concerned has varied with almost every blockade, and the blockade itself has always been applied by a strong naval power against a weaker one as a means short of war, the alternative of war not being accepted by the weaker power on account of the disparity of forces and hopelessness of success.

It is an anomaly in international law: there being no war, there are no belligerents, no neutrals.

It is illegal to have a blockade apply to third or unconcerned powers when there is no war, and yet such a blockade will not be effective if the vessels and goods of these powers are allowed to enter freely, and if the blockade is confined to the blockading and blockaded vessels.

Each case will probably depend upon its own merits, and above all whether it will be worth while for any third or out-

side great power to interfere. In the so-called pacific blockade of Formosa by the French, which involved the capture of vessels other than Chinese and French, Great Britain took the position that it was not proper and would not be recognized by her unless regular war was declared against China. But in the late blockade of Crete by the European powers, of which she was one, the right of search was exercised by the blockaders upon the so-called neutral vessels, and they were prohibited to land cargo destined for the Greek troops in the interior.

De Martens says as to the legality, that it is admissible but not logical; while Perels, the German authority, speaks decidedly of it as coming clearly under the head of reprisals and as an evil less than war. The last statement is probably the one that will make it acceptable alone, and it will probably be treated in the future as a blockade with war powers, but confined to the parties concerned and a localized and definitely bounded area of operations.

Two instances not generally mentioned in the text-books may be profitably discussed as late examples of this means of reprisal.

177. Case of Zanzibar.—One is the blockade of Zanzibar in 1888 by Great Britain, Germany, Italy and Portugal, and was specifically directed against the slave trade which the authorities of Zanzibar were unable or unwilling to stop. As this action was against a specific evil, recognized as such by the civilized world, no international complications were involved.

178. Case of Crete.—The pacific blockade of Crete commenced March 21, 1897. The naval forces of Great Britain, Austro-Hungary, France, Germany, Italy and Russia put the Island of Crete in a state of blockade on that date at 8 a. m. The blockade was to be general for all ships under the Greek flag. The ships of the six great powers or of what may, for the locality, be called neutral powers were allowed to enter in the

ports occupied by the blockading powers and to land their cargoes, provided they were not intended for the Greek troops in the interior. The ships of the neutral and blockading powers were to be visited by the ships of the international fleet.

This, though infringing the rights of neutrals, was less radical than the first definite pacific blockade of the French at Vera Cruz in 1838, where the vessels of the third powers were captured and confiscated.

179. Attitude of the United States as to pacific blockade.—The United States declared with respect to this blockade, and has taken the position as a general one, that it does “not acquiesce in any extension of the doctrine of pacific blockade which may adversely affect the rights of states not parties to the controversy, or discriminate against the commerce of neutral nations.”

In regard to the blockade of Venezuelan ports in 1902 by Germany and Great Britain this enunciation of the position of the United States was repeated.

The blockade of the Venezuelan forces was stated to be a warlike blockade, and a notice was published to that effect on December 20, 1902, for the information of neutrals.

Moore says that it may be observed that the United States did not take the ground that there could not be such a thing as a pacific blockade, for it stated that it could not acquiesce “in any extension” of the doctrine of pacific blockade so as to affect “the rights of states not parties to the controversy.”

It can thus be seen that without admitting the pacific blockade to be a legal means of restraint or reprisal short of war, the tendency of writers and of states is to favor its exercise in a manner not to involve the third powers or to antagonize their interests. Localized, as it should be, in its field of operations it is far better than actual war, especially a European war, which would be likely to be a widely spread calamity.

PART III.

WAR.



CHAPTER VII.

GENERAL QUESTIONS AS TO WAR.—ARMED FORCES OF THE STATE.—MARITIME WARFARE.

180. Definition of war.—War can be defined as a contest, existing or declared, between two or more nations or belligerents through their armed forces for the purpose of securing the submission of one side to the wishes of the other. Properly speaking, a contest between a state and a party of individuals, or acts of armed forces performed by one state against another by way of reprisals or intervention, are not acts of war unless resisted in a similar manner or met by a declaration that such acts are considered by the offended state as acts of war.

181. General questions as to war.—"The independent societies of men, called states," says Wheaton, "acknowledge no common arbiter or judge, except such as are constituted by special compact. The laws by which they are governed is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every state has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each state is also entitled to judge for itself what are the nature and extent of the injuries which will justify such a means of redress."¹

* * * * *

"The right of making war, as well of authorizing reprisals or other acts of vindictive retaliation, belongs, in every civilized nation, to the supreme power of the state. The exercise

¹ Wheaton. 8th edn. (Dana), p. 308.

of the right is regulated by the fundamental laws or municipal constitution in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation,"² such, for example, as the British East India Company of times past, or the British South African Company of the present time, exercising as they do and did, to an extent certain sovereign rights with respect to foreign states or savage communities.

182. The war-making power.—But with respect to the United States no such rights can be delegated. The exercise of the war-making power is vested in Congress alone, and the President has no constitutional right or authority to order aggressive hostilities to be undertaken.

As Secretary Cass said to Lord Napier in 1857, in regard to a combined expedition into China, "Our naval officers have the right—it is their duty, indeed—to employ the forces under their command not only in self-defense but for the protection of our citizens when exposed to acts of lawless outrage, and this they have done, both in China and elsewhere, and will do again when necessary, but military expeditions into the Chinese territory cannot be undertaken without the authority of the national legislature." The Boxer expeditions of 1900 were not considered as a violation of this policy. The condition of Peking was regarded as one of virtual anarchy, requiring action for the rescue and protection of American officials, citizens and property. At the same time the policy was announced as one of a preservation of Chinese territorial and administrative entity.^{3a}

183. Effect of war upon states and individuals.—The effect of war upon the relations of all states is to change them radically. The *contending* parties become what are known as *belliger-*

² Wheaton, 8th edn. (Dana), p. 373.

^{3a} Circular of the United States, July 3, 1900.

ents; the other states become *neutrals*. New rights and new obligations arise and no state can, strictly speaking, be said to play an entirely passive or disinterested part.

As to the individuals of each belligerent state there also arises a change of relations whether they are directly involved in the military contest or not. A new theory has been advanced of late years as to individual relations during war between the subjects of belligerent states.

The old theory was that all citizens of one belligerent state were enemies of all citizens or subjects of the other. The new theory is that war is a contest between state and state, and that private citizens of the belligerent countries should not be molested either as to persons or property. The practice and usage do not conform to either theory.

Private individuals, for instance, cannot hold pacific intercourse with the enemy; it is treason for them to give the enemy military intelligence, they must not buy the funds nor securities of the enemy, commercial partnerships with the enemy's subjects are dissolved by war, no debts can be paid to enemy's subjects during war, contracts cannot be enforced, insurance of enemy's property cannot be effected, and, in general, all business relations are suspended.

In a military sense also war cannot be relegated to a duel of forces. A general uprising of the inhabitants of an invaded country cannot be prohibited. Requisitions and contributions can still be raised upon the non-combatants on the enemy's soil, and at sea private enemy property is still subject to capture by the rules of international law. On land, devastation, by which is meant a destruction of private resources available for enemy supplies, is permissible under certain circumstances.

184. Effect of war upon treaties.—Treaties existing between belligerents alone are in general abrogated or suspended during war. The principal exceptions are treaties regulating the

conduct of belligerents towards each other in case of war. In these cases, naturally such treaties, suspended during peace, are brought into operation by war.

Treaties to which other powers besides the belligerents are parties, when the war is not connected with the treaty, remain unchanged. Ordinary treaties are generally suspended or abrogated with regard to belligerents, but unaffected with regard to the third parties. Such general agreements like the declarations of Paris and St. Petersburg go into effect with war so far as the signatory powers are concerned.

There is a class of treaties, of a permanent nature, duly fulfilled, which as between belligerents are held to be unaffected. They are of the nature of boundary treaties, treaties of cession and treaties of recognition. They remain unchanged during the war, no matter if they are changed at its termination. The boundaries of two belligerent states may be changed at the end of a war as a consequence of the war, but during its continuance the old boundaries remain until the conquest is completed and the readjustment effected by treaty.

185 Quasi-war.—A limited or quasi-war may also exist like that between France and the United States in 1798 in the West Indies. The hostilities at that time were limited as to places, persons and things.

186. Duties in case of war on part of naval officers.—The Naval Regulations of the United States require of commanders-in-chief and of those in command that "When the United States is at war he shall require all under his command to observe the rules of humane warfare and the principles of international law. When dealing with neutrals, he shall cause all under his command to observe the rules of international law and the stipulations of treaties, and expect and exact a like observance from others."³

³ Art. 1634, Naval Regs., 1913.

187. Outbreak of war.—In the convention relative to the commencement of hostilities drawn up at the Second Hague Conference in 1907, and signed by all of the powers therein represented but China and Nicaragua, the following articles were adopted:

“Art. 1. The contracting powers recognize that hostilities between them must not commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war.

“Art. 2. The state of war should be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be made by telegraph. Nevertheless, neutral powers cannot plead the absence of notification if it be established beyond doubt that they were in fact aware of the state of war.”⁴

The first article takes effect in case of war between two or more of the contracting powers, while the second article is binding as between a belligerent power which is a party to the convention, and neutral powers which are also parties to the convention. This convention was ratified March 10, 1908, by the Senate of the United States.

In commenting upon the above articles it has been well said that “although the contracting powers have agreed on a rule that hostilities are not to commence without previous warning, they have not precluded the possibility of a surprise attack, for the conference rejected the Dutch proposal for the very limited delay of twenty-four hours between the presentation of the declaration and the outbreak of hostilities.” This delay of twenty-four hours by enabling a change in the position of naval forces, the whereabouts of which are frequently matters of conjecture, might have most important consequences in the initial stages of belligerent operations.

⁴ ‘Higgins’ Hague Conferences, pp. 198, 199; pp. 204-205.

The exercise of the war-making power of the United States is vested, as has already been said, in Congress, and the President has no constitutional right or authority to declare war, but he is directed and authorized, however, by the statutes of the United States in times of insurrection, invasion or rebellion, or of imminent danger thereof, to call forth troops to suppress such insurrection or rebellion and to repel such invasion.*

188. In civil wars there is no declaration.—In a civil war there is no formal declaration, and the war dates from the recognition of belligerency of the insurgents either by a third power or by some act of war on the part of the legal government, such as a declaration of a blockade or the exchange of prisoners.

Thus, in the case of our Civil War in 1861, although Fort Sumter was fired upon on April 12, yet there was no legal war until the proclamation of blockade by President Lincoln on April 17, a blockade being an act of war which affected neutrals.

189. Armed forces of the State.—The armed forces of the state, in a general sense, consist of its army and navy. The army and navy of a state are formed and organized by a state under its own laws. In some states they are formed by conscription alone, in others by conscription, volunteer corps and the militia. In still other states by volunteer corps alone, with the militia in time of war. In The Hague Convention of 1907 it is stated that the "laws, rights and duties of war apply not only to the army, but also to militia and corps of volunteers, fulfilling the following conditions:

"1. That of being commanded by a person responsible for his subordinates;

"2. That of having a distinctive emblem fixed and recognizable at a distance;

* U. S. Rev. Stat., Secs. 1642, 5297, 5298, 5299.

“ 3. That of carrying arms openly ; and

“ 4. That of conducting their operations in accordance with the laws and customs of war.”

“ In countries where militia or corps of volunteers constitute the army, or form part of it, they are included under the denomination ‘ army.’ ”

“ Art. 2. The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with the previous article, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.”

“ Art. 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy, both have a right to be treated as prisoners of war.”⁶

The non-combatants referred to above are of many kinds, such as telegraph operators, couriers, aeronauts, surgeons, chaplains, nurses, teamsters, sutlers, civilian attachés of the staff of the commander-in-chief, servants, etc.

190. Naval forces.—In addition to the armed forces of the state duly constituted for land warfare, the following are recognized as armed forces for maritime warfare :

“ The officers and men of the regular naval establishment, the naval reserve, the naval militia and their auxiliaries. The officers and men of all other armed vessels cruising against the enemy under lawful authority.”⁷

191. The objects and area in maritime warfare.—The area of maritime warfare comprises the high seas and the territorial waters of the belligerents.

⁶ Higgins, Hague, pp. 219, 221.

⁷ Higgins, p. 221.

⁸ U. S. Naval War Code, Art. 1.

“The special objects in maritime warfare are the capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry-docks and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land, and to protect and defend the national territory, property and sea-borne commerce.”*

The general object of war being to procure the complete submission of the enemy at the earliest possible period, with the least expenditure of life and property, there results measures of military necessity that are indispensable for the securing the ends of war, but which must be in accordance with the modern laws and customs of war.

192. Laws and customs of war on land.—For warfare on land these laws and customs are found in the convention concerning the laws and customs of war on land adopted at the Second Hague Conference in 1907, and signed by the United States, and finally ratified March 10, 1908. In various of these articles are matters applicable alike to the military and naval forces, and they should be consulted in common with the code of the United States Army issued under the title of General Order No. 100.

In addition to these codes, applicable to warfare on land, and in part to warfare at sea, there are others somewhat applicable to both, like the Geneva Convention of 1906 and the additional conventions of the Second Hague Conference, treating of the commencement of hostilities on neutral powers and persons on land warfare, and the declaration prohibiting the discharge of projectiles and explosives from balloons.

193. Conventions applicable to maritime warfare.—For the purposes of maritime war the following conventions adopted at

* *Idem*, Art. 2.

the Second Hague Conference of 1907, and ratified by the United States in 1908, are applicable: The convention relative to the laying of automatic submarine contact mines, the convention respecting bombardments by naval forces in time of war, the convention for the adaptation of the principles of the Geneva Convention to maritime warfare, the convention relative to certain restrictions on the exercise of the "right of capture in maritime war," and with two exceptions the convention respecting the rights and duties of neutral powers in maritime wars.

194. Declaration of London.—In addition to these is the Declaration of London of 1909, signed and agreed upon by all the delegates to the International Naval Conference held in London, 1908-1909, and approved by the President of the United States, afterwards ratified, alone, by the Senate of the United States. Whether ratified or not this declaration has great weight in the enunciation of certain principles of international law, both with regard to maritime war and the dealings of matters likely to come before a prize court. It will be found in the Appendix. The naval war code promulgated by Secretary of the Navy Jno. D. Long in 1900, although afterwards revoked, is still quoted by the Department of State as authoritative as a matter of opinion, and was the basis of the instructions to the delegation of the United States to the Naval Conference of London in 1908.

195. Attack and capture of public vessels of the enemy.—One of the objects of maritime wars has been given as the capture or destruction of public armed and unarmed vessels of the enemy cruising under lawful authority.

In these times the vessels just enumerated would be of a multitude of types and of many origins. Besides the usual and regular vessels of the navy in existence at the outbreak of war, the entire revenue marine service of our country is incorporated by law into the navy, the subsidized merchant

liners also follow that course, becoming either armed men-of-war or unarmed auxiliaries, and also other vessels that can be purchased or acquired in any way, that are capable of use as colliers, supply vessels, distilling ships, machine-repair vessels, parent ships for torpedo vessels, submarine mine vessels, transports, hospital ships, etc.

After the outbreak of war all men-of-war and other public vessels like those just mentioned of the enemy which are met by a man-of-war of the other belligerent on the high seas or within the territorial waters of either belligerent can at once be attacked without further notice than the display of the national ensign of the attacking force. Only a man-of-war can attack men-of-war unless a country like our own, not adherent to the Declaration of Paris, should create privateers. For the same reason as a non-adherent, privateers could be used against us.

When one or the other of the vessels engaged in action determines to yield or surrender, which circumstance is generally shown by hauling down the flag or by the exhibition of the white flag of truce, firing must cease on the part of the victor and negotiations by persons or signals begun. To continue an attack after knowledge of surrender, or to sink a vessel after submission, is a violation of the rules of civilized warfare, only permissible in cases of treachery or renewal of the action.

A public vessel becoming a prize of war is taken possession of by the captor; its officers and men become prisoners of war, and no legal proceedings are necessary, as in the case of privately owned vessels. Non-combatants on board of an armed vessel and the personnel of a public unarmed vessel of the enemy are liable to detention as prisoners of war, excepting those who are exempt under the Geneva Conventions.

196. Floating mines in war.—An indirect and comparatively new method of attack upon vessels of war is made through

floating contact mines, operated either by ordinary mechanism or electrical apparatus. This method came into prominence by the operations in the vicinity of Port Arthur during the late Russo-Japanese War, although they had been used during our Civil War. Very great losses of life and material occurred off Port Arthur on both sides from these mines. The use of these mines has been the subject of one of the conventions of the Second Hague Conference.

By this convention it is forbidden to lay anchored or unanchored automatic contact mines or torpedoes, unless they be so constructed as to become harmless after they have broken loose or missed their target, or in case of unanchored mines one hour at most after those who laid them have lost control over them.

It is also forbidden to lay automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial navigation. When anchored mines of this nature are used every possible precaution must be taken for the security of peaceful navigation. The danger zones for these mines must be notified to the various neutral governments as soon as military exigencies permit, by notices to mariners and through the usual diplomatic channels.

Neutral powers laying automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed upon belligerents, and in advance of this laying operation.

At the close of the war the signatory powers undertake to do their utmost to remove the mines which they have laid, each power removing its own mines. With respect to anchored automatic contact mines laid by one of the belligerents off the coast of the other, it is required that the positions of these mines must be notified to the other power at the close of the

war by the power which laid them. This convention was ratified by the United States March 10, 1908."

187. Bombardment of undefended places.—By the convention adopted at the Second Hague Conference in 1907, the bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings is forbidden. A port is not considered defended solely because automatic submarine contact mines are anchored off the harbor.

Ships of war in the harbor, or military or naval establishments on shore, are not, however, included in this prohibition. These may be destroyed by gun-fire after a summons, if all other means are impossible, and if the local authorities have not themselves destroyed them within the time fixed.

If the local authorities, however, refuse to comply with reasonable and formal requisitions for supplies or provisions necessary for the immediate use of the naval force before the place is captured, it is permitted to commence a bombardment after due notice. Such requisitions must be proportional to the resources of the place, and should be demanded in the name of the commanding officer of the naval force, and, as far as possible, be paid for in ready money, their receipt being duly acknowledged.

The bombardment of undefended ports, towns, villages, dwellings or buildings for the non-payment of money contributions is forbidden. In all bombardments all necessary steps should be taken by the commanding officer to spare as far as possible buildings devoted to public worship, art, science or charitable purposes, historic monuments, hospitals and places where the sick or wounded are collected, provided on the latter are not used at the time for military purposes. These places are to be indicated by visible signs, consisting of large white rectangular marks divided diagonally into two

colored triangular portions, the upper portion black, the lower portion white.

The giving over to pillage of a town or place, even when taken by assault, is forbidden. These provisions are only applicable, of course, between contracting powers, but it is unlikely that they will fail of observance in any case. The convention was ratified by the Senate of the United States March 10, 1908.

198. Status of vessels at outbreak of war.—A convention relative to days of grace or the status of enemy merchant ships at the outbreak of hostilities was formulated at the Second Hague Conference. It was, however, so vague and unsatisfactory that it was not signed by the United States, and, of course, not ratified by the Senate of the United States, and is not of binding force so far as our country is concerned. Our refusal to sign was based on the ground that the convention was an unsatisfactory compromise between those "who believe in the existence of a right and those who refuse to recognize the legal validity of the custom which has grown up in recent years." We have been the most liberal nation in matters of this sort; during the Spanish-American War we allowed, by proclamation issued April 26, 1898, Spanish merchantmen in American ports until May 21 for loading their cargoes and departing, and such cargoes were not to be captured on their voyage if it appeared from their papers that the cargoes were taken on board within the time allowed. Exception was made of vessels having on board military or naval officers of the enemy, contraband of war, or dispatches to or from the Spanish Government. Generally the period of days of grace allowed for a stay or departure from port by other countries is very short.

199. Conversion of merchantmen into vessels of war.—It may be of interest to examine the question of the conversion of merchantmen into men-of-war, although the specific conven-

tion drawn up at the Second Hague Conference was not signed by the American delegation, and hence not submitted to the Senate of the United States for ratification. The same question came up for discussion at the International Naval Conference at London, but without any tangible result. The Declaration of Paris, which has been acceded to by practically all nations but the United States, and in principle by us, provides for the abolition of privateering or the use of privately owned and armed vessels for the capture of merchantmen of the enemy. The disposition to use merchantmen suitable for war purposes still remains, and in order to avoid the requirements of the Declaration of Paris, the first article of which forbids privateering, it becomes necessary to incorporate these vessels by purchase or charter into the regular naval service of the State. Prussia, in the Franco-German War, was the first country after the Declaration of Paris to propose the formation of a volunteer navy. An appeal was made in 1870 to German sailors and shipowners to place their resources and ships at the disposal of their country. The ships so offered were to be placed under naval discipline during the war, and the officers and crew were to be entered for the same period into the navy of the German confederation, with commissions, rank, uniforms, etc., to be entitled to pensions, and in the case of meritorious service to have permanent commissions. France protested against this plan, but the British law officers, when consulted by their government, decided that the proposed scheme was not a violation of the Declaration of Paris against privateering. This plan, however, of Germany was finally abandoned.

200. Russian volunteer fleet.—In 1877-1878 the relations between Great Britain and Russia being somewhat strained a patriotic association was formed in Russia with the object of raising money and buying fast merchantmen to act as auxiliaries to the Imperial Navy. The vessels acquired were

to be placed under the command of officers of the Imperial Navy, and the crews held under military discipline. This service still exists under the name of the Russian Volunteer Fleet, and is subsidized by the government, being normally engaged in merchant trade in peace under the merchant flag, with the commander and at least one other officer holding a commission in the Imperial Russian Navy. These vessels are also employed by the Imperial Government as transports.

In France some of the mail steamers are under the command of naval officers, the steamship company receiving a subsidy from the government, with the plans of construction approved by the French Minister of Marine with a view to the use of the vessels for war purposes. They become incorporated into the regular French naval establishment on the outbreak of war.

201. British subsidized lines.—Great Britain has at various times also entered into arrangements with several of its great steamship companies by which, in return for an annual subsidy, these companies agree to sell or charter to the government, at a fixed price on short notice, their faster vessels, and to build new ships on plans approved by the British Admiralty. The “Mauretania” and “Lusitania” of the Cunard Line owe their existence to the initiative and subvention of the British Government on this basis. Half of the crews of these vessels are members of the Royal Naval Reserve, and the Admiralty has the right of placing on board fittings for use in war time.

202. American subsidized lines.—Our own government made somewhat similar arrangements with the American Line and other steamers coming under the subsidy laws, and in the Spanish War the American Line steamers were chartered and fitted for war purposes as fast cruisers. A captain and a lieutenant and a marine guard were the only navy contingent placed on board.

The arrangements made by the various maritime powers vary as to the rules and means of incorporation into the regular navy, but all are to be placed under the command of the regular naval departments, to carry the man-of-war flag, to be commanded by officers duly commissioned in the naval establishment, and to have crews regularly entered and uniformed, as well as being under the obligation to observe the laws of war. Hence they are entitled to be considered as parts of the regular naval forces of the belligerent, and to be treated with the same consideration as those of the continuous naval establishment of the state."

An incident of the Russo-Japanese War which evoked much discussion and friction between Russia and Great Britain led to this subject of the conversion of merchantmen into men-of-war being included in the programme of the Second Hague Conference.

203. Case of the "Petersburg" and "Smolensk."—Two vessels, the "Petersburg" and "Smolensk," belonging to the Russian Volunteer Navy stationed in the Black Sea, on July 4 and 6, 1904, passed, it is said, without the knowledge of the Russian Foreign Office, through the Bosphorus and the Dardanelles flying the flag of the Russian mercantile marine. These straits are, by the Treaties of Paris, Berlin and London, closed ordinarily to vessels of war. The vessels also passed through the Suez Canal under the same flag. The "Petersburg" certainly, and possibly the "Smolensk" also, engaged pilots for the Red Sea as a vessel of commerce. When in the Red Sea they hoisted the ensign of the Imperial Navy, and the "Petersburg" captured the "Malacca," a P. & O. mail steamer. Ultimately, after strong protests by the British Government, these vessels were ordered to haul down the flag of the Im-

" See Moore's Digest, Supreme Court decisions as to Yale (St. Louis).

perial Navy and to cease to act as cruisers, and Russia agreed that all vessels captured by them should be restored."

The convention of the Second Hague Conference upon this subject, as agreed upon by the signatories, reads as follows:

204. Convention of the Second Hague Conference as to the conversion of merchantmen.—"Art. 1. No merchant ship converted into a war ship can have the right and duties appertaining to that status unless it is placed under the direct authority, immediate control and responsibility of the power whose flag it flies.

"Art. 2. Merchant vessels converted into war ships must bear the external marks which distinguish the war ships of their nationality.

"Art. 3. The commander must be in the service of the state and duly commissioned by the proper authorities. His name must figure on the list of the officers of the military fleet.

"Art. 4. The crew must be subject to the rules of military discipline.

"Art. 5. Every merchant ship converted into a war ship is bound to observe, in its operations, the laws and customs of war.

"Art. 6. A belligerent who converts a merchant ship into a war ship must, as soon as possible, announce such conversion in the list of the ships of its military fleet."

These rules could certainly have little fault found with them. Though this convention was not signed by the United States the requirements contained therein have always been followed since the Declaration of Paris and probably always will be followed by us.

The reason given by our delegation for not signing the convention was that it was simply a reiteration of the Declaration of Paris, relative to the abolition of privateering, and

¹² Higgins, p. 314.

that the Government of the United States will not agree to that declaration until other governments recognize the immunity from capture of private property at sea.

As to captured public vessels of the enemy they can be destroyed at once, taken into port or used for military or other services at the discretion of the captor. As to goods or cargo carried on board a public vessel of the enemy they can be used at once, or destroyed, if they belong to the enemy, without further prize proceedings. As to neutral property on board an enemy's armed vessels authorities differ, our decisions being in favor of releasing it, while the English decisions take the opposing views. As the decision of our Supreme Court upon this point in the *Nereide* case referred to a letter of marque, it is possible that in modern circumstances it would not be sustained, and that the reasoning of Mr. Justice Story of our own courts, and Lord Stowell of the English courts, would be followed.

Public or private vessels of the enemy when engaged in scientific purposes or voyages of discovery, or of relief or charitable purposes, are granted immunity from attack and capture so long as they confine themselves to their purposes and abstain from hostilities. Art. 13, Naval War Code, reads "that all public vessels of the enemy are subject to capture except those engaged in purely charitable or scientific pursuits, in voyages of discovery or as hospital ships under the regulations hereinafter mentioned. Cartel and other vessels of the enemy furnished with a proper safe-conduct are exempt from capture unless engaged in trade or belligerent operations."

205. Capture of enemy's merchantmen and privately owned vessels.—Among the special objects of maritime war is the capture or destruction of the maritime commerce of the enemy. This objective of war is still in force so far as the United States is concerned in a general sense, notwithstanding her

efforts to have a different policy created, exceptions exist, however, where by treaty with special countries agreement has been made as to a different line of conduct. No prize money or bounty is, however, now awarded since the Act of 1899 for captures of any kind.

206. Exception in practice.—In 1866 Austria and Prussia on the outbreak of war between themselves declared that enemy's ships and cargoes would not be captured so long as this policy was adhered to by both of the countries concerned, and the war was carried on between these states and between Austria and Italy to the end without any capture of private property at sea.

207. Exceptions with us in accordance with treaty.—The treaty between the United States and Italy of February 26, 1871, reads as follows:

“The high contracting parties agree that in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party.”

This treaty is still in force.

Art. 23 of the treaty with Prussia on the part of the United States also exempted private property from capture, but that is now obsolete; but Art. 13 of the Treaty of 1799, revised by Art. 12 of the Treaty of 1828 with Prussia, providing for the detention and non-confiscation of contraband, is still in force.

208. Capture of unarmed merchantmen at sea.—Before the capture of a merchant vessel it is necessary to determine its nationality. If this should be recognized as an enemy by the display of her colors then the vessel is taken charge of,

as in the case of the capture of an enemy's vessel of war if she surrenders after being brought to by the firing of the summoning gun. To bring any vessel to, this gun is fired, loaded with a blank charge, and pointed in the direction of the vessel approached. If this should not be sufficient to cause the vessel approached to lie to, a projectile is fired across her bows, and in case of continued flight or resistance a projectile can be fired at the vessel and force can be used to compel her to stop or surrender.

In case no colors are shown or any other colors than those of the enemy, the pursuing or intercepting vessel proceeds to exercise the right of search and visit. This is done by sending one of its boats alongside with one or more officers in charge wearing side arms to conduct the search. Arms may be carried in the boat, but as a rule not upon the persons of the men unless there is reason to expect immediate resistance. When the boarding officer goes on board of the vessel he may be accompanied by not more than two men, unarmed, unless circumstances require otherwise. The boarding officer, after making known the object of his visit, then examines the vessel's papers to ascertain her nationality, the nature of her cargo and the ports of departure and destination. If the papers show the vessel to be an enemy, or carrying contraband, engaged in unneutral service or in the violation of blockade, the vessel should be seized; otherwise she should be released unless suspicious circumstances justify a further search and consequent detention. If the vessel be released an entry in the log-book to that effect should be made by the boarding officer.

The exercise of the right of search during war is conferred upon properly commissioned and authorized vessels of war. The exercise of the right of capture is now conferred upon vessels of the same character.

209. Sending in as a prize.—After a prize is made it should be sent in for adjudication, unless otherwise directed, to the nearest suitable port within the territorial jurisdiction, in our case, of the United States of America in which a prize court may take action.

The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure, and to this end her papers should be carefully sealed at the time of seizure and kept in the custody of the prize master.

All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and if circumstances permit it is preferable that the officer making the search should act as prize master. The title to property requiring adjudication as a prize changes only by the decision rendered by the prize court; hence the national colors of the vessel seized remains her proper flag until such decision is rendered.

210. Destruction of enemy vessels as prizes.—As a rule the captured enemy merchantman must not be destroyed but sent in as a prize to port for adjudication by a prize court. In case of military or other necessity, however, these vessels may be destroyed or they may be retained for the service of the government of the captor. Whenever captured vessels, arms, munitions of war or other material are destroyed or taken for the use of the United States before coming into the custody of the prize court, they are to be surveyed, appraised and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisal and inventory is to be sent to the prize court where proceedings are to be held. Unseaworthiness, the existence of infectious disease or the lack of a prize crew are sufficient reasons for the destruction of an enemy prize, and if there should be no doubt that the enemy vessel was a proper prize the imminent danger of re-

capture would justify destruction. Of course, with the Declaration of London ratified and in full force, if the captured vessel jeopardizes by its presence the success of any military operations it may be destroyed, as a neutral prize also may be destroyed under the same circumstances. In a similar manner an enemy merchant vessel carrying neutral goods may be destroyed with the goods, as in the case of the neutral prize.

Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, tackle and cargo.

This exemption ceases as soon as they take any part whatever in hostilities, or are prepared for military purposes or assistance.

The laws of war upon land being a subject of separate study, I will not enter now into this question except to state that these laws hold good for sea warfare wherever circumstances make them applicable.

211. Submarine cables in war time.—A convenient expression upon the question of dealing with submarine telegraphic cables may be found in Article 5 of the late United States Naval War Code, which reads as follows:

1. Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

2. Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

3. Submarine telegraphic cables between two neutral countries shall be held inviolable and free from interruption.

It may be of interest to state here the instructions given by the British Government during the Spanish-American

War as to the use of telegraphic cables at that time. They read as follows:

“Belligerent war vessels should be prevented from using the telegraph for the purpose of sending in cipher or otherwise messages of which the object is to direct or influence warlike operations. A belligerent war vessel may, however, use the telegraph for messages which do not relate to proceedings of the belligerents, or for messages which are not in cipher narrating past operations and intended for general publication as news. Officers in command of belligerent war vessels should be informed that it is a condition of their being permitted to use the telegraph to guarantee and agree that they shall abstain from transmitting or procuring the transmission of any telegrams which concern the conduct of warlike operations. Vessels which merely carry dispatches may be permitted the telegraph, and should not, except under special circumstances, be subjected to the same conditions as belligerent war vessels with respect to not using the cable. Consular officers have a right to free communication with their governments whether plain or in cipher.”¹³

¹³ During the present European war the usages as to submarine cables and wireless telegraph have been extended so as to change the methods given under this head. The method proposed in Art. 5, par. 2, of the Naval War Code has not been followed by several of the belligerents, as cables between a belligerent country and a neutral country have been cut on the high seas. Censorship over cables and wireless telegraph has also been established in neutral countries for better observance of neutrality.

CHAPTER VIII.

EFFECT OF WAR AS TO PERSONS.—EFFECT OF WAR UPON TRADE AND PROPERTY.

212. Effect of war as to persons in general.—The effect of war between two or more belligerents is to give an enemy character in varying degree to all persons and things pertaining to the belligerents. Some persons become enemies in the fullest sense of the word, that is, they may be killed or captured by the armed forces of the opposing state; others are enemies only in the sense that their business or freedom of movement suffers certain restrictions.

So with property it may be of such a nature, or under such conditions that it is subject to capture and total loss wherever and whenever it is lawful to carry on hostilities; while under other conditions it may be touched only in very special cases.

In a broad sense the citizens or subjects of a belligerent state are divided into two classes, *combatants* and *non-combatants*.

213. Non-combatants are those persons of the belligerent states not bearing arms and engaged in peaceful pursuits. They are, when disconnected from hostile movements, exempt from hostile attack or imprisonment. They are, however, exposed to all the personal injuries which may arise incidentally from military or naval operations, such as the bombardment of a town, the firing upon a ship carrying passengers, an attack upon the train of any army (which may involve chaplains, surgeons and volunteer nurses), and like acts of war.

The non-combatant population of districts that are invaded or are in the occupation of an enemy may also be compelled to perform certain services to the enemy.

A class of persons that comes rather between combatants and non-combatants are officers and seamen navigating the merchant vessels of a belligerent state. The members of this class are different from ordinary combatants in that they cannot properly make aggressive war, and they differ from ordinary non-combatants in that they can fight to defend their vessel if attacked, and fight to recover it if captured. Under these circumstances they are combatants and treated as such. If while part of a merchant vessel they attack any other merchant vessels they can be subjected to all the severities which the international rules of war permit against non-combatants who perform hostile acts against an enemy.

They are also so placed that they may become prisoners of war on account of their special fitness or readiness to become of use on board vessels of war. They have the sea-legs and hands and stomachs to start with, and are accustomed to the *habitat* of seamen afloat. The merchant marine has been from time immemorial the nursery of the navy.¹

In 1870 Bismarck denied that sailors found in merchant vessels could be made prisoners of war, and threatened and finally did make reprisals on this account. The French Government in responding had no difficulty in showing that the usage of capturing sailors had been an invariable one; that the mercantile marine of a nation, apart from any question of privateering, is capable of being transformed at will into an instrument of war, and that where, as in Germany, all sea-faring men are subject to conscription for the navy, the reasons for capture were of double force. This reasoning though sound had no effect upon the actions of Bismarck; though Bismarck's action in turn did not affect the rule.

214. Surgeons and chaplains.—The position of surgeons and chaplains has been in the past an uncertain one. They were captured and detained as prisoners of war by the Confederates during the Civil War, while the instructions for the armies

¹ Convention XI of the Second Hague Conference, in Articles 5, 6, and 7, has caused a change in this respect.

of the United States in the same war provided that they were only to be retained if the commander of the army capturing them had need of their services. Under the Geneva Convention of 1906, however, chaplains and medical officers and medical units are not subject to capture as prisoners of war, provided they do not commit acts harmful to an enemy. As these rules are almost universally adopted, this usage may be said to prevail.

It is generally conceded that certain non-combatants from their position and importance to the enemy can be made and retained as prisoners of war. These are the monarch and members of the reigning family, the chief executive and chief officers of the hostile government, diplomatic agents, and any person who for special reasons may be of importance at a special time to an enemy.

215. Combatants are persons enrolled and found in the military and naval service of the belligerent state. They may be killed or wounded in a fair fight, and if captured may be held as prisoners of war. They are entitled to all the rights of war as provided for in international law. Their nationality makes no difference in this respect unless they are subjects of the state against which they are fighting. In such case this state would have the right, should they be captured, to execute them as traitors, instead of considering them as prisoners of war.*

Neutral subjects in the ranks of an enemy consequently receive the same treatment as enemy subjects, they have neither immunities nor special severities. Their own state may possibly at some future time punish them for breach of her neutrality regulations in joining a foreign army to fight against a state with which she is at peace, but, so far as the enemy state is concerned, they are lawful combatants.

* See Par. 1, Art. 3, U. S. Naval War Code.

A question was raised in the Franco-German War, and since, as to the status of irregular troops, like the French *franc tireurs*, whether they should be recognized and treated as combatants. Certainly if such troops appear as tillers of the soil at one time and guerillas killing and wounding stragglers at the next moment, their position is illegal and a harsh treatment is excusable; but to condemn all irregular troops and to forbid the rising of the people *en masse* in order to repel an invasion of their country is quite another. A certain amount of organization with responsible chiefs and a recognizable uniform or badge should however be insisted upon. And above all arms should be carried openly.

There are some persons of the non-combatant class who possess the character of an enemy to a degree so as to effect their property in cases in which it is involved.

They are:

1. Persons residing in an enemy country though not subjects of it.

"These," as Lawrence says, "are enemies to one belligerent in so far as they are identified with the other." That is to say, any property they possess in connection with their residence is enemy property, in case it is exposed to maritime capture, or in case the territory in which they reside is a place of warlike operations and actual hostilities. The fact that the person is a subject of the country of the invaders would not exempt his property or himself from disabilities, or from use if needed by a belligerent for military purposes.

2. Persons living in places in the military occupation of the enemy.

People in this class enrich the occupying enemy by contributing, though unwillingly, to his warlike resources. If the enemy is dispossessed they lose their enemy taint and become in all respects subjects of their own states. During our Civil War the courts held that all places in secure pos-

session of the Southern Confederacy was enemy territory, and the property there enemy property, so far as warlike capture was concerned, and without regard to the question of individual loyalty.

3. Neutral subjects having houses of trade in the enemy's country.

These are enemies so far as their property involved with these houses of trade is concerned. At the same time an enemy merchant with house of trade in a neutral country is likely to have his goods also seized. It is a case where a rule does not work both ways. In the first place the national character of the place prevails, in the second case the national character of the person holds.*

216. Effect of war as to property.—The first property that takes an inimical character is naturally the *property of a belligerent state* of a warlike nature. In fact all property belonging to the state becomes enemy property with the limitation that property not of a warlike nature, or of the nature of resources, cannot properly be subject to wanton destruction. It can be used, of course, but not legitimately destroyed. A familiar historical example of the violation of this rule was the destruction or partial destruction of the Capitol and other public buildings in Washington during the War of 1812 by the British forces. Even English writers of the present day do not condone this action. The excuse was offered by the British authorities at the time that it was in retaliation for the burning of the village of Newark in Canada by our forces; but it was established that this burning was an incident of the hostile operations there, and not deliberate, and besides no complaint had been made to us nor reparation asked. It is reasonably well established that before retaliation can be exercised against an enemy, proper reparation should be asked, which, if refused, then gives a right to exercise retaliation.

Property belonging to a state or territory occupied by an

* This is not universally held. See Higgins' Hague Conferences, i. 571, etc.

enemy cannot be sold by the occupying belligerents. The property can be used or rented by the belligerent, but upon his departure he has neither the right to destroy it, if it be not of a military nature, nor to sell it. All such acquired titles are illegal and, of course, not recognized by the state to which they belong upon reoccupation.

The seizure of money belonging to the enemy state is legitimate, except funds set apart for hospitals, schools, and for scientific or artistic objects. Taxes for local administrative purposes, such as roads, police, lighting towns, etc., are not legitimate objects of capture or confiscation. Timber can be cut and sold from state forests, but apart from the necessities of war, such as the necessity for fuel, etc., timber should not be cut so as to affect the future annual productiveness of the timbered lands. During the Franco-German War, for instance, the German authorities sold 15,000 oaks growing in the state forests in certain departments of France. After the war the French authorities seized those which had not already been removed. The purchasers appealed to the German Government, but the latter left it to the French courts, which annulled the sale as being wasteful and excessive.

Vessels of the state engaged in peaceful explorations or voyages of scientific discovery are by common consent granted immunity from capture, as has been previously stated.

Although the usage is not definitely settled the prevailing opinion of jurists and of the most enlightened people is that the contents of museums and libraries, as well as works of art, are not legitimate objects of capture or removal. During the campaigns of the Revolution, and of the First French Empire, the practice was otherwise, but until the recent short-lived Turko-Greek War the rule was not to disturb such things. In 1897 the director of museums at Constantinople sent an order to the commander-in-chief of the Turkish army at Thessaly to transport to the capital all antiquities found

during the occupation. This has been done, and the great powers of Europe, in arranging the treaty of peace, either ignored or assented to this spoliation.*

217. Property of individual enemy subjects.—Property belonging to the individual subjects of the enemy state assumes the character of enemy property.

Property on land of this kind is in modern times exempt from direct seizure, but through contributions and requisitions, fines, etc., such property suffers indirectly but heavily in occupied territory, not to speak of the direct results of the march of a great army through a territory. Besides there is the possibility of its use for hostile purposes and a liability to direct destruction of anything approaching military resources in case a devastation is ordered to prevent the supplies reaching the other belligerent. Private property under an enemy flag at sea is still liable to capture and confiscation by the laws of the United States, although we have by action of Congress expressed our desire to see this liability abolished by the universal assent of the maritime powers.

There are some anomalies that would come within this subject, as when one belligerent assumes a protectorate over another state or country. In this case war does not necessarily exist between the protected state and the other belligerent. A case in point was the position of the Ionian Islands in the Crimean War. This little republic, under the protectorate of Great Britain, still kept up its trade with Russia, and an Ionian vessel captured for trading with the enemy was released by the English courts on the ground that the Ionian Republic was not at war with Russia. Hall gives a good rule for such cases when he says that the *use* which a country or place is put by the power which exercises *de facto* control determines the neutrality or belligerency of the territory.

* Art. 56 of Hague Laws of War on Land.

218. As to persons living in enemy country.—One of the first questions arising at the outbreak of war would be the future status of *enemy subjects* or *citizens* residing in the state of the other belligerent at the outbreak of war.

The treatment of such persons has varied very much since the Middle Ages, but the usage has been progressively more and more humane and liberal.

The modern doctrine can be stated to be that expulsion may be resorted to in extreme cases, the necessity to be judged by the government of the state, but unless there are special reasons existing the subjects or citizens of the enemy state should be allowed to remain in the state of the other belligerent so long as they gave no aid or information to their own country.

The United States took the stand by special treaty with Great Britain in 1794 that in future wars between the countries, subjects or citizens of each residing in the country of the other should remain undisturbed so long as they lived peaceably and observed the laws. If their conduct was such as to cause them to be suspected they were to be allowed a term of twelve months to settle their affairs before leaving.

Dr. T. J. Lawrence sums up the modern rule of international law as to this matter in general terms to be "that, in absence of treaty stipulations, the right to arrest no longer exists, and, though the right to expel remains, it should be used sparingly and only in great emergencies."

The last instance of expulsion was in 1870 of Germans from the Department of the Seine during the Franco-German War of that date until the present European War.

CHAPTER IX.

WAR CODES.—LAWS OF WAR.—GENEVA CONVENTIONS.

219. War codes.—It is gratifying to quote the statement of Bluntschli, a distinguished European publicist, when he says that of the various modern acts and movements that have tended to ameliorate the evils of war, the promulgation of the “instructions for the government of the armies of the United States in the field, drawn up mainly by Dr. Francis Lieber, as a general order in 1863, was among the first and most remarkable.” These rules are still in existence, and are in substantial accordance with the existing conventions adopted by The Hague Conferences in 1899 and 1907. These latter codes were adhered to by the United States, and that of 1907 will be found in the Appendix.

To these codes have been added the authoritative rules embraced in what is known as the Geneva Convention for the amelioration of the condition of the sick and wounded. This convention has been agreed to generally by the civilized powers, the United States acceding to the original articles March 1, 1882, and the convention is also authorized by The Hague code for warfare on land. The additional articles of the Geneva Convention which were tentatively adopted by the United States, have been superseded by the articles adopted by The Hague Conference of 1907, which are also in the Appendix.

Men who take up arms against one another in public war do not, as one of the articles of the code says, cease on that account to be human beings, responsible to one another and to God. The laws of war do not recognize in belligerents

an unlimited liberty as to the means of injuring the enemy. Belligerents are expected to avoid all needless severity and all perfidious, unjust or tyrannical acts. Agreements made by them during the continuance of war are to be scrupulously observed and respected. Religion and morality, the persons of the inhabitants, especially those of women, and the sacredness of domestic relations must be acknowledged and protected during hostilities and in hostile countries.

All municipal law of the land upon which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field, but crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery and rape, if committed in an hostile country, are not only punishable as at home, but in all cases in which death is not inflicted the severest punishment shall be preferred.

220. The laws of war.—Before going more into detail as to the rulings of the law or laws of war upon various subjects during war and hostilities, let us ascertain the definition and scope of the law of war in its international aspect. Colonel Winthrop, of the United States Army, one of the most distinguished writers upon military law, says:

“By the term of *law of war* is intended that branch of international law which prescribes the rights and obligations of belligerents—or more broadly, those principles and usages which in time of war define the status and relations not only of enemies—whether or not in arms—but also of persons under military government or martial law, and persons simply resident or being upon the theatre of war, and which authorize their trial and punishment when offenders.”

“On the actual theatre of military operations,” says Mr. Justice Field,¹ “the ordinary laws of the land are superseded

¹ *Beckwith vs. Bean*, 98 U. S., 293.

by the laws of war. The jurisdiction of the civil magistrate is there suspended and military authority and force are substituted. Finding, indeed, its original authority in the war powers of Congress and the Executive and thus constitutional in its source the law of war may in its exercise substantially supersede for the time even the Constitution itself." (*"Inter arma silent leges."*)

The laws of war apply to the Navy as well as to the Army of the United States; the military establishment of our country in a legal sense being composed of the army and navy. For this reason an examination of the various usages and laws of war which may apply to both services is not out of place. It is not necessary perhaps to more than mention generally that the laws of war as now in force do not permit the use of poison or poisoned weapons, cold-blooded murder of individuals by treachery, the killing of antagonists who have surrendered, the use of arms, projectiles or substances that will cause unnecessary suffering, the refusal of quarter, or a declaration that no quarter will be given. By the Convention of 1907 which is now, alone of the two mentioned, in force with the signatory powers, a belligerent state is responsible for all acts committed by persons forming part of its armed forces.

221. Prisoners of war.—Prisoners of war are to be treated with humanity and should be exchanged without unreasonable delay. Capture is now neither a matter of punishment nor an act of vengeance, but a detention devoid of any penal character. The persons entitled to the consideration and privileges of prisoners of war are members of the army or navy of the enemy, both combatants and non-combatants, and the wounded and sick taken during operations or in hospitals. Civilians engaged in military or auxiliary duties such as clerks, telegraphers, aeronauts, teamsters, laborers, messengers, guides, scouts, pilots and men employed in trans-

ports, tenders and on military railways are liable to be held as prisoners of war. Camp followers, such as sutlers, contractors, newspaper correspondents, and others who are allowed with an army, are subject, if thought fit, to the restraint and treatment of prisoners of war, and have a right to be treated as such so long as they can produce a certificate from the military authorities of the army they were accompanying.

Prisoners of war are at the disposal of the enemy's government, but not at the disposal of the individuals, or corps, which have captured them. Each prisoner should be treated with the regard due to his rank. The government of the captor is charged with their maintenance, and where not otherwise agreed upon they should be rationed and clothed in the same manner as the troops of the government of the captor. If the captor is without the means of subsisting or transporting his prisoners they should then be released on parole. Prisoners should not be deprived of their personal property, unless it should be of large sums of money or of such a nature as to be intended for, or adapted to, military uses.

Prisoners of war cannot rightfully be required to furnish information concerning their own forces, etc., or to assist, by labor or service, the military operations of the enemy. They may be employed upon public works, not of a military character, providing that the work is not exhausting and is in accordance with their military rank and position. They can be subject to such discipline as is necessary for good order and their safe-keeping, and they can be punished for any attempt to escape, if recaptured before quitting the territory occupied by the army of the captors or before rejoining their own army.

222. Exchange of prisoners.—Prisoners can be liberated by exchange or parole. Cartels or conventions of exchange are

drawn up for the purpose of establishing the conditions and scale of exchange. In the cartel arranged between the United States and the Confederate States in 1862 it was stipulated for instance that a general commanding, or admiral, should be exchanged for an officer of equal rank, or for sixty privates or common seamen, and so down to a lieutenant, whose equivalent is four privates. Citizens were to be exchanged for citizens, occupations for occupations.

223. Parole.—The parole in its simplest form is a pledge to the effect that the prisoner will not bear arms against the government or armies of the captor during the pending war unless duly exchanged. He may, in general, in the absence of stipulations to the contrary, legally perform internal service, such as recruiting or drilling recruits, garrisoning posts not in the theatre of war, guarding stores or provisions of war in the interior, and paying the troops and making purchases on account of the general government. A paroled prisoner, for instance, was detailed for duty at the Naval Academy during the civil war as instructor. No military person other than a commissioned officer can give a parole for himself or others. Paroles must be voluntary on both sides. A breach of parole, once punishable by death, is now punished by a deprivation of the rights of prisoners of war and further punishment by courts. A prisoner of war cannot be forced to accept his liberty on parole.

Troops seeking refuge from an enemy in neutral territory may be *interned* by the neutral government until the end of the war, but at the expense of the government of the *interned* troops, as in the case of Bourbaki's army, which took refuge in Switzerland during the Franco-German War, where they were disarmed and their arms held as security for payment of their support.

Officers taken prisoners shall receive the same pay as officers of corresponding rank in the country where they are detained;

the amount to be repaid by their government. Prisoners of war are allowed every latitude for the exercise of their own religion.

224. Care of the sick and wounded.—Sick and wounded officers and men taken in the field or hospital, as well as other persons officially attached to fleets or armies, are prisoners of war, and entitled to receive the same treatment, whatever their nationality, as members of the captured army similarly placed. Ambulances and hospitals are neutralized by the Geneva Convention, and protected and respected by both belligerents so long as any sick or wounded may be therein. If these ambulances and hospitals are protected by armed troops detailed for the purpose then the neutralization and protection ceases.

The rules of the Geneva Convention further provide that persons employed in hospitals or ambulances, comprising the medical staff, as well as chaplains, shall participate in the benefit of neutrality while so employed, and may continue to fulfil their duties, so far as military exigencies permit. Any belligerent approval to abandon sick or wounded should leave with them part of their medical staff.

Inhabitants of the country who may bring help to the wounded shall be respected and remain free. Taking care of the wounded in private houses protects those houses and exempts them from quartering of troops and contributions. The insignia of the red cross on a white ground is used as the emblem of the medical service of armies. This device is used as a compliment to Switzerland.

225. The Geneva Convention and maritime warfare, 1907.—

An attempt was made in 1868 to apply by a general agreement the principles of the Geneva Convention of 1864 to naval warfare, but this was unsuccessful. At the First Hague Conference in 1899, however, a convention making this application was agreed to and finally signed by all of the powers

represented at this conference. Since then, in 1906, a new Geneva Convention for land warfare was agreed upon, and, subsequently, at the Second Hague Conference of 1907, the Convention of 1899 for naval warfare was revised to accord with the new convention applying to land warfare. In addition to this revision certain other additions and amendments which were considered necessary and advisable were incorporated in the revised convention. This convention has been signed and ratified by the United States, and will be found in the Appendix to this treatise.

226. Hospital ships.—The hospital ships to be used in time of war under this convention are divided into the three following classes:

1. Military hospital ships, which are ships constructed or adapted by the governments of the belligerents especially and solely with the view of aiding the shipwrecked, sick and wounded. The names of these ships are to be communicated to the other belligerent powers at the commencement of or during the course of the hostilities, and in any case before they are employed. These ships are to be duly respected and cannot be captured while the hostilities last.

These military hospital ships are not under the restrictions of belligerent men-of-war, with respect to the duration of their stay in neutral ports. They are distinguished by their white hulls, with a horizontal band or ribbon of green about a metre and a half in width.*

2. Hospital ships equipped wholly or in part at the expense of private individuals or officially recognized relief societies. They shall likewise be respected and exempted from capture, if the belligerent power whose flag they carry has given them an official commission and has notified their name to the hostile power at the commencement of or during hostilities, and in any case before they are employed.

*Art. 1, Convention X, Appendix.

Such ships must be provided with a document from the proper authorities declaring that the vessels have been under their control while fitting out and upon final departure. They are distinguished by white hulls, with a band or ribbon of red about a metre and a half in width.*

3. Hospital ships which are equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries. They are to be respected and exempt from capture on condition that they are placed under the control of one of the belligerents, with the previous consent of their own governments and with the authorization of the belligerent himself, and upon condition that the latter has notified their names to his adversary at the commencement of or during hostilities, and in any case before they are employed.

The hospital ships of the third class have the same marks as those of the second class, that is, a white hull with a red band.†

The boats of all classes of hospital ships, as well as any small craft that may be used for hospital work, shall be distinguished by being painted in a similar manner. The ships and boats just mentioned wishing to be free from interference at night must (subject to the approval of the belligerents they are accompanying) take measures to render their special painting visible. The ships of the third class carry three flags, that of their own country in its regular place, the flag of the belligerent in whose services they are at the main, and the Red Cross flag at the fore. Should the ship be detained by the opposing belligerent the flag at the main is hauled down.

227. As to relief by neutral merchantmen and yachts.—In Article 9 of the convention it is provided that belligerents may ap-

* Art. 2, Convention X, Appendix.

† Art. 3, Convention X, Appendix.

peal to the charity of the commanders of neutral merchant ships, yachts or boats to take on board and attend the sick and wounded. It is further provided that vessels responding to this appeal, and also vessels which have of their own accord received sick, wounded or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for the sole reason of having such persons on board; but, subject, to any undertaking that may have been given to them, they remain liable to capture for any violations of neutrality they may commit.

This article, with a following one, covers the much-discussed question of the action of the English yacht "Deerhound" in her rescue of Captain Semmes of the "Alabama" after the sinking of that vessel by the "Kearsarge." After Semmes was picked up by the "Deerhound" this yacht slipped away without responding to the directions of the "Kearsarge" to come within hail, and liberated Semmes by landing him on neutral territory. This solution of the question so long in debate seems to have met with general approval, and certainly conforms to the usages of land warfare as to the custody of the sick and wounded, not to speak of the able-bodied and uninjured shipwrecked officers and men. As Higgins says: "Among those on board a hospital or merchant ship may be found the 'brain' of one of the belligerent navies, and 'military necessity' might be appealed to as a justification for his removal. Moreover, the neutral captain might, from unforeseen circumstances, be unable to land the sick, wounded or shipwrecked at a neutral port where they would be interned."

Although a belligerent may, under this latter article, remove wounded, sick or shipwrecked combatants, he cannot change the course of a neutral merchant vessel or impose any definite

*Hague Peace Conferences, Higgins, p. 389.

course upon such vessel; such orders can only be given to the commanders of regular hospital ships.

The British Government in signing this convention stated through its delegates that its "understanding was that this article (No. 12) applied only to the case of combatants rescued during or after a naval engagement in which they had taken part."

The thirteenth article provides that if wounded, sick or shipwrecked persons are taken on board neutral vessels of war, precautions must be taken that, so far as it is possible, they do not again take part in the operations of war. In the case of the action in Chemulpo Harbor, in the early days of the Russo-Japanese War, when Russian sick and wounded were taken on board British and other vessels of war at anchor in the harbor, the sick and wounded on board the British ships were, with the consent of the Japanese Government, handed over to the Russians at a neutral port. By the adoption of the thirteenth article a different policy is now provided.*

228. Fortified and unfortified places.—At one time it was held that it was an offense to defend an open and unfortified town or resist in a weak place the attack of a vastly superior force. These views may now be considered obsolete. The bombardment, however, of an entirely unfortified town by land forces is forbidden, as it is forbidden to naval forces.

Earthworks which can be thrown up in a few hours are very efficient defenses and they can gradually be so strengthened as to be able to resist heavy artillery. Plevna, for instance, was an open town when Osman Pasha determined to hold it as a defensive point in 1877; but by continuous labor and engineering skill it was rendered so strong that it repulsed three distinct assaults made in force by the Russians.

* Appendix 4.

With the facilities for defense just named every place may be considered a possible fortress if its topographical situation favors defense; and it can be no longer held that there should be any discriminating severity against a commander who holds a place by improvised works. His forces, if captured, are entitled to the same privileges as troops captured in the open field.

Fortified places in time of war are liable at any time to attack and bombardment. The fact of its fortification justifies a surprise and in time of war the non-combatants residing in such a place must be prepared to share its fortunes. Cutting off the food and water supply of a besieged place in order to hasten its surrender is no more warlike.

Bombardment should be made to the best of the besiegers in the way and the means of attacking the fort under siege. The use of shells and other projectiles is the legitimate work. Attacking the garrison and the place by the use of the resistance of the place is not warlike. The use of shells and other projectiles is the legitimate work. Attacking the garrison and the place by the use of the resistance of the place is not warlike.

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229. Pillage.—Pillage is now forbidden even when places are taken by assault. Requisitions and contributions have taken the place of pillage in all well-ordered and disciplined forces.¹

230. Hostages.—In modern times hostages have been seized as a species of retaliation, and held until reparation has been made or offenders surrendered for trial. They have been used for the protection of railway trains, etc. In 1862 General Rosseau, of the United States Army, while commanding in Alabama, found great trouble from the killing of loyal citizens by lawless persons firing into railway trains, and “ordered that the preachers and leading men of the churches (not exceeding twelve in number) in and about Huntsville, who have been active secessionists, be arrested and kept in custody, and that one of them be detailed each day and placed on board the train running by way of Athens, and taken to Elk River and back, and that a like detail be made and taken to Stevenson and back.”

In 1870, under somewhat similar circumstances, the German military authorities required that railway trains on a French railway should be accompanied by well-known and respected inhabitants of the town *en route* who should be placed upon the engine and held as hostages to ensure the trains from attack or interruption by *francs tireurs*, etc.

231. Spies.—“A spy,” says Winthrop, “is a person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy; or one who, being by authority within the line, attempts secretly to accomplish such purpose. The information is commonly such as relates to the numbers or resources of the enemy the state of his defenses, the positions of his forces, military or naval, and the like.”

¹ Laws and Customs of War. See Appendix.

By the articles for the government of the navy it is directed that punishment for a spy is "death or such other punishment as a court martial may adjudge." By Section 1343 of the Revised Statutes of the United States, any persons lurking or acting as spies in or about the armies of the United States or elsewhere, shall be triable by a general court martial and shall, on conviction thereof, *suffer death*. By the law of nations the crime of spy is punishable with death, after trial. In most cases during our late war the form of death was by hanging. Women, who are especially qualified to act as spies on account, as Winthrop says, of "the natural subtlety of their sex," were in some instances sentenced to be hung as spies, though in their case this punishment was rarely, if ever, enforced. A spy who returns to his own army and is subsequently captured is treated as a prisoner of war only.*

In closing this topic it is well to note that the extreme punishment attached to the spy is not on account of the depravity of his acts, but that on account of the secrecy and fraud connected therewith it may readily expose a military or naval force, without warning, to the greatest disaster. A spy is necessarily a volunteer, and when, with full knowledge of the consequences and from patriotic motives alone, he exposes himself to such imminent danger for the public good, he and his memory is worthy to be held in the highest honor by his fellow countrymen. Such a spy was Nathan Hale of Revolutionary fame.

~~202~~ **Use of flags.**—The proper use of flags and emblems is a matter of consequence in international law, as well as in military and naval law. In both cases a flag when displayed is an evidence of the nationality of the forces engaged, and that those who use the regimental or national colors are of the national forces of the country.

To use false colors is a more serious offense against international law on land than upon sea. By the code established in 1907 at the Second Hague Conference it is forbidden to make improper use of the national standard, military ensigns or enemy's uniform, as well as the distinctive badges of the Geneva Convention.

On ships of war it has been permissible to use foreign flags to deceive an enemy, but the tendency is against such practice. As a man-of-war cannot be searched or examined to discover her identity, she should not have the privilege of using false colors. The regulations of the United States Navy require that under no circumstances shall an action be fought without the display of the proper national flags.

233. Flag of truce.—A flag of truce is the well-known square white flag, and is used for a parley between opposing forces. International law extends its protection around this flag and to any duly authorized persons carrying it. The protection is extended to all of the necessary accompanying persons, such as the bearer or flag-carrier, a trumpeter, bugler or drummer, and an interpreter, besides the officer who is to make the parley.

Admission to the opposing lines by the party carrying this flag cannot be claimed as a right. The commander of the forces to whom the flag is sent may, if he chooses, give general notice to the other belligerent that he will not receive any flags of truce, or none within a certain period, or except at certain places; or he may warn off any particular flag of truce; but without such warning or notice, to fire upon a flag of truce, or to offer any violence to the bearer, is an offense against the rules of war subjecting the offenders to the most summary punishment.

In 1827, in Navarino Bay, the firing upon an English boat carrying a flag of truce by a Turkish man-of-war, which killed an officer in the boat, brought on the naval battle of

Navarino, which in turn led to the destruction of the Turkish fleet and to the independence of Greece. A flag of truce being admitted, precautions may be taken, of course, by blindfolding or otherwise, to prevent improper advantage being taken. A bearer of the flag is also bound to act in good faith; if he should in any way abuse the confidence of the receiving force he loses his privileges and may be detained and tried for violation of the laws of war. If he should, for instance, excite officers or soldiers to desert, or purchase plans, or attempt secret communication he may in extreme cases be held and executed as a spy.

The use of the white flag of truce has sometimes extended beyond the ordinary use as prescribed by the laws of war.

"To show the white flag" has been considered a readiness to surrender, and during our Civil War, and even farther back, has been used as a mark of capitulation. During the Civil War at times bodies of Confederates marched over to the Union side with a display of white flags in their muskets. In such cases the irregularity of its use was waived.

In 1652, during a naval engagement between the English and Dutch fleets, a narrator quaintly says, "We did very good execution on them, and some of their ships that had lost all their masts struck their colors and put out a white handkerchief on a staff, and hauled in all their guns."

234. Exemption of coast and food fisheries.—A matter which has now been entirely settled is the exemption of coast fisheries.* It has not been the rule, however, to disturb innocent fishermen or their boats along the sea or lake coasts. There have been circumstances, however, which seemed to justify such destruction.

In the early English and Dutch wars, when it was determined to lay such stress upon Holland and the Dutch as to bring them to terms, such measures of destruction were adopted. The Dutch herring fishery was considered so vital

* See Art. 30 of Convention XI for Restrictions on Capture in Time of War. 2d Hague Conference.

to that country that its destruction followed as a measure of war. Three hundred and sixty thousand Dutch people, at that time, depended upon this herring fishery for their subsistence. Amsterdam, the principal city of Holland, according to the old Dutch proverb, was built upon herrings alone.

In 1798 and 1801 the British Government ordered the capture of French fishing craft to prevent their use by Napoleon in his proposed invasion of England. But however justifiable these cases may be, the destruction of fishing craft, as a rule, the ordinary tools of livelihood of a poor class of people, equivalent to the ploughs and implements of the farmer, is neither humane nor ordinarily justifiable by the results obtained.

CHAPTER X.

MILITARY OCCUPATION.—TERMINATION OF WAR.— CONQUEST.

235. Military occupation.—A conquest and occupation of an enemy's territory is followed by a military government of that territory.

The best authorities regard a territory as occupied in a military sense when as a consequence of its invasion by the enemy's forces the nation from which it has been taken has ceased as a matter of fact to have any regular authority there, and the invading forces alone find themselves able to maintain order therein. The limits within which this state of affairs exist determines the extent and the duration of the occupation and military government.¹

The immediate effect of the military occupation of any portion of an enemy's country is the suspension of any and all authority which is derived from the government of the enemy over the occupied territory.

236. Military government.—In the jurisprudence of the United States the system of rules established by the invading force is called *military government*. Such government is peculiar in that it is subject to no constitutional or legal restraints other than those imposed by international law and the usages of war. The previously existing laws of the district, so far as they relate to the exercise of public administration are of no validity against the invader; while, on the other hand, the occupied territory lies without the bounds of the nation to

¹ See Sec. III, Laws and Customs of War on Land. Appendix.

which the occupying army belongs, and hence neither the constitution nor the laws of that country can have any force there.

The result, then, is that the declared will of the military commander, tempered by his instructions, and by the humane sentiment of the times, and also by the established practice of civilized warfare, must be regarded as having the force of law within the occupied territory. Chief Justice Chase of the United States Supreme Court defined military government as a form of "military jurisdiction to be exercised by the military commander under the direction of the President (who is military commander-in-chief) in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents."

237. Martial law.—Sometimes military government has been confused with martial law. Martial law, however, is rather such a suspension of law, which has been best defined as being a military rule exercised by the United States or by a single state of the Union over its own citizens (not being enemies), in an emergency justifying its proclamation. It is declared at times to secure the suspension of the writs of *habeas corpus*. It was declared in portions of the North during the Civil War by the general government, by the State of Rhode Island during Dorr's Rebellion, and in more recent times in the State of Washington on account of the anti-Chinese riots, and in 1892 in Idaho by the Governor on account of a miners' riot in one county. There is some doubt as to the power of a Governor of a *territory* to declare martial law, although such power has been exercised in the past.

238. Authority for military government.—The authority for military government is the fact of the occupation. A proclamation or public notice to the inhabitants informing them of the extent of the occupation and the powers propose

to be exercised is customary, but not necessary. Military government, whether administered by officers of the navy or those of the army of the belligerent, or by civilians, left by him personally in office, or by other civilians appointed by the military commander, is the government of and for all of the inhabitants, native or foreign. The local laws or ordinances may be left in force, and, in general, as a matter of convenience should be, subject, however, to their being in whole or in part suspended and others substituted at the discretion of the governing military authority.

Instances of military government in the history of the United States exist in all of our wars. During the revolutionary war military government was exercised by the British during their occupation of Boston, New York and Philadelphia. In the War of 1812 it was exercised at Castine, Maine, during British occupation, and in the Mexican War by us in the City of Mexico and elsewhere. During the Mexican War, when the port of Mazatlan was captured by our naval forces, a military government was provided by the commodore in command and a purser of the navy was made collector of the port. During the Civil War of 1861-1865, from reason of its exceptional proportions, military government was more generally and variously exercised than at any other period of our history. The military governments exercised in Porto Rico, Cuba and the Philippines during and since the Spanish War are, of course, well known.

The population of the occupied territory cannot be required to swear allegiance to the country of the invader, nor can the inhabitants be compelled to perform military service against their own country. Residents who rise against the government of the occupation have been called war rebels, and in the present instructions to our armies, under General Order No. 100, the offense was punishable with death; but it is doubtful whether the opinion of the present day would

sanction such severity. A war traitor, however, whose offense would be a treacherous one, like that of a spy, would probably meet the same penalty as a spy.

A temporary success of a raid or of a popular uprising would not destroy the rights of military occupation, but a recapture of the occupied territory causes the rights of occupation to cease. The rights founded on force cease when that force is overcome.

239. Requisitions for supplies for army in occupation.—An army in occupation generally finds it necessary in a greater or less degree to require from the occupied territory the supplies necessary for its support. If practicable, these military requisitions, as they are called, which are generally articles of daily consumption, are made the subject of formal requisitions upon the civil officials or upon the individuals possessing such articles in quantity. They should not exceed the military necessities nor the resources of the country. The German forces before Paris, at Versailles, made daily requisitions for the following articles, which give an idea of the quantity and extent of their demands. They required 120,000 loaves of bread, 80,000 pounds of meat, 90,000 pounds of oats, 27,000 pounds of rice, 7,000 pounds of coffee, 4,000 pounds of salt, 20,000 litres of wine and 500,000 cigars.

240. Contributions.—Contributions are sums of money exacted over and above the taxes drawn from the occupied districts or particular portions thereof. They should be imposed only from necessity and on the written order and responsibility of the general or commander-in-chief, or of the superior civil authority established by the forces holding the occupied territory. Receipts should be given in all cases, both for requisitions and contributions, in order, at least, to afford proof to other commanders of the amount already exacted from this district, and as evidence in case the original government in the invaded and occupied state should decide to pay the

amounts after the war was over from the general taxation of funds of the country. In 1871 the French Government after the war appropriated 100,000,000 francs to districts most impoverished by the enemy.*

241. Indemnities.—Indemnities are contributions levied at the end of the war to pay in whole or in part the war expenses of the victor. They are arranged for in the treaty of peace, and certain territory of the enemy is generally occupied until the indemnity is paid.

242. Armistice.—An armistice is an agreement which may be applicable to an entire army or naval force, or to only a portion or district, for the suspension of hostilities or operations. Its duration is usually fixed and official notice of its period and other terms is given without delay to all those whom it may concern. During its pendency neither party—in the absence of a special condition authorizing it—may engage in any military work, operation or movement, at least upon the immediate theatre of war; or under its cover execute a retreat. If violated by one of the parties the other is entitled to terminate it, and its violation by private individuals subjects them to punishment under the laws of war and to a liability to give indemnity.

If the cessation of hostilities is for a very brief period or for a temporary purpose, such as for a parley or for removing the wounded or burying the dead, it may be well to use the term "suspension of arms."

On the contrary, if it should be a cessation of hostilities preliminary to a treaty of peace, and a cessation that covers the general operations of the war ashore and afloat, it may be called either a general armistice or a general truce—indifferently.

The offense of violation of an armistice may consist of a

* Arts. 48, etc., *Laws and Customs of War on Land*. Appendix.

violation of its terms or some act which is opposed to the state of the suspension of arms. In a general way it may be said that any military operations which would have to be done *under fire* should *not* be done during an armistice, but any act which could be done without reference to the enemy is proper during an armistice.

During a general armistice each belligerent may do what it pleases beyond the zone of actual hostile operations. Ships can be fitted out, troops moved and recruits made. As to the revictualling of besieged places the fair plan would be to allow it to be supplied every few days in order to keep up the state at the time of the armistice. This is, however, a matter for special agreement, or if the besiegers are the strongest party at their option. The Germans, for instance, in 1871 refused to allow Paris to receive any provisions during the armistice which preceded its final surrender.

243. Cartel.—A *cartel*, or rather a *cartel of exchange*, is a formal written agreement entered into by the opposing belligerents for the exchange of prisoners. A cartel is a convention of weighty character which imposes solemn obligations upon both parties, in which both the national honor and faith is involved. A cartel can be made between commanders-in-chief or by the governments through other agents.

A cartel ship is a vessel employed to exchange prisoners or to arrange under a flag of truce for cessation of hostilities or similar matters. The cartel ship is neutralized by her office and is unarmed.

244. Capitulation.—A capitulation is an agreement for the surrender of a military or naval force or of a fortified place, the terms of which are settled by the opposing commanders. The conditions of a capitulation should be such as would not involve any unnecessary disgrace or ignominy. Private effects should not be required to be surrendered and officers are generally allowed to retain their swords.

A capitulation is subject to disapproval and revocation by the government of either commander. The capitulation of General Johnson to General Sherman in North Carolina during the Civil War was repudiated by the government at Washington upon the ground of its assuming to deal with political issues.

Such stipulations in excess of the powers of commanders are sometimes called *sponsions* and are null and void unless the principals on each side accept them. The main conditions of General Sherman's agreement that were not acceptable to the Federal Government were those recognizing the state governments which submitted to the Federal authorities and those guaranteeing to the people of the Confederacy their political rights and franchises as citizens of the United States.

If an officer in chief command of an army, fleet or fortified place makes stipulations affecting other portions of the field of operations not within his control, these stipulations must be ratified by the commander-in-chief before they become valid.

245. Termination of war.—War between civilized states almost always ends by the conclusion of a treaty of peace. Sometimes, however, the war fades away by the inability, or a want of desire, to continue hostilities, and no treaty is made as in the war between Spain and Chile, 1867, and France and Mexico, 1864, and sometimes it ends also without treaty when the nationality or existence of one of the belligerents disappears, as in the case of the third partition of Poland or of the fall of the Southern Confederacy.

246. Treaties of peace or inconclusive terminations.—A treaty of peace as a rule settles all the matters in dispute between the belligerents. There are instances, however, as in the case of our second war with Great Britain, when to an earnest desire for peace on both sides is added a practical impossibility of settling the questions which brought on the war. In this

case the Treaty of Ghent established peace and amity between Great Britain and ourselves, but dealt with little else except various boundary questions which were of no particular importance as causes of the war or of its prolongation.

The Constitution of the United States in vesting in the President, by and with the advice and consent of the Senate, the authority to make treaties constitutes him, with that body, the peace-making power of the Republic so far as foreign nations are concerned. Under the circumstances of his position he generally takes the initiative, though Congress can compel him to act for peace by refusing the means of carrying on war.

The war status in foreign wars is held to end with the date of the treaty or agreement, formally entered upon, with the opposing belligerent. The date is generally announced in a public manner by a proclamation by the President.

In the case of civil wars, rebellions, etc., in the absence of any legislative provision upon the subject, a proclamation by the President to the effect that hostilities have come to an end or that the rebellion has been suppressed is ordinarily accepted as fixing an authoritative date for the discontinuance of the *status belli*.

In our Civil War different states of the Union were named in different proclamations, and hence the Civil War closed at different dates in different states.

A treaty of peace has been well defined as an act by which the belligerent governments, taking into consideration the state of their forces and the results of the war, determine their respective pretensions and convert them into rights and obligations.

As soon as peace is established all acts must cease which are permitted only in time of war.

"Thus," says Hall, "if an army is in occupation of hostile territory when peace is made, not only can it levy no more

contributions or requisitions during such time as may elapse before it evacuates the country, but it cannot demand arrears of those of which the payment has been already ordered. It is obviously not an exception to this rule that an enemy may be authorized by the treaty of peace itself to do certain acts which, apart from agreement, would be acts of war, such as to remain in occupation of territory until specific stipulations have been fulfilled, or to levy contributions or requisitions if the subsistence of the troops in occupation is not provided for by the government of the occupied district."

Preliminaries of peace are arrangements intended to put an end to hostilities without waiting for the delays incident to the discussions preceding the establishment of a regular and definite treaty of peace. In the Chino-Japanese War an armistice was agreed to on March 30, the actual treaty of peace not being ratified and effective until the 8th of the following May.

Very often the preliminaries provide for more than a cessation of hostilities, containing stipulations which are afterwards, with changes of detail, incorporated into the treaty of peace.

247. Commencement of peace.—When a treaty fixes a date in the future for the commencement of peace, which is very exceptional in practice, it is done on account of the delay in notifying regions in which hostilities are still going on. This is, of course, a rare instance in these days of quick communication. It may happen, however, even now in distant seas or in inland territories, and it may happen also that official information reaches such vessels or such forces before the time designated as the commencement of peace. Under such circumstances it is considered proper if the news is official and well authenticated to have hostilities stop and the state of peace begin.

A naval or military commander is not obliged, however, to

accept any information as to peace which is not duly authenticated by his own government. The consequences of suspending hostilities upon false news may be very serious, and if it were once established that commanders were bound to act upon information obtained otherwise than by official sources from their own government it might be difficult to prevent them from being misled by intentional deceit.

248. Captures with respect to period of peace.—In the Treaty of Ghent it was provided that hostilities were to cease upon the ratification of the treaty, and prizes taken after that date were to be restored, but with a time allowance for the intelligence of the peace to reach the various parts of the seas of the world. An American cruiser captured a British vessel before the period fixed for the cessation of hostilities, and in ignorance of the fact, but before the prize had been condemned, it was recaptured at sea by a British ship of war after the period fixed for the cessation of hostilities, but also without knowledge of the peace. It was judicially determined that the capture by the American was lawful, but the recapture, after the peace, was not lawful.

249. *Uti possidetis*.—The commencement of peace put an end to all force, and then the general principle is in force that things acquired in war remain, as to title and possession, as they stood when the peace began. This general principle is known as the *uti possidetis*, and is the basis of every treaty of peace unless the contrary is expressly stipulated. "Peace," says Wheaton, "gives a final and perfect title to captures without condemnation, and as it forbids all force it destroys all hope of recovery as much as if the captured vessel was judiciously condemned."

250. Case of the "Mentor."—In the case of the "Mentor," an American vessel captured by British ships off the Capes of the Delaware after the cessation of hostilities, though in ignorance of the fact, it was held in the British Admiralty Court by

Sir William Scott that the capture was illegal, and that as the hostile acts were illegal the officer committing the acts was liable for damages; but if the officer committed such acts in ignorance of the conclusion of the war his own government should protect him, as it was the duty of the government to have given him notice of the ending of the war.

The restoration of peace carries with it the revival of certain private as well as public rights and obligations. Debts can be again sued for, contracts again enforced between the subjects of the late belligerent powers. Performance of acts rendered impossible by the war cannot, of course, be claimed. A man cannot be required to sell a house or live stock destroyed by war, and the time named for obligations does not include the period of war.

Treaties of peace are valid whether made with the authority that declared the war or *de facto* governments that have arisen since, so long as the authorities are those entrusted with this duty by the constitutional law.

Conquest of territory invests the conquering state with title to all the state property in that territory, and with all the rights and obligations that pertain to that territory.

251. Sovereignty over inhabitants of acquired territory.—The conquering state obtains sovereignty over all the subjects of the acquired territory, and the inhabitants become citizens or subjects by acquisition. They may or may not be given full political rights. It is usual, however, to insert a stipulation in modern treaties giving liberty of choice to the inhabitants of the conquered territory to remain citizens of the original country. Sometimes this liberty of choice is fettered with the condition that they must leave the conquered territory if they elect to go with their former state. In the cession of Alsace and Lorraine it was provided that those who wished to retain their French nationality must emigrate, but they

were allowed to retain the ownership of their real estate within the ceded territory.

Administrative and similar acts not of a political or military nature remain good, such for example as the sentences on ordinary criminals, the payment of taxes, etc.

Conquest is distinguished from military occupation in that it is the completed and final status of the acquired territory recognized by treaty or otherwise.

With respect to the legitimacy of conquest on the part of the United States the following opinion of Chief Justice Marshall upon the subject is herewith given: "The constitution confers on the government of the Union the power of making war and of making treaties, consequently that government possesses the power of acquiring territory either by conquest or treaty."^{*}

^{*} American Ins. Co. *vs.* Carter 1 Peters Report, pp. 511-542.



PART IV.

**RELATIONS BETWEEN BELLIGERENTS
AND NEUTRALS.**



CHAPTER XI.

NEUTRALITY.—RIGHTS AND DUTIES OF NEUTRALS.—BELLIGERENT ACTS NOT PERMISSIBLE IN NEUTRAL TERRITORY.

252. Neutrality.—Rights and duties of neutrals.—"The right of every independent state," says Wheaton, "to remain at peace, whilst other states are engaged in war, is an incontestable attribute of sovereignty. It is, however, obviously impossible that neutral nations should be wholly unaffected by the existence of war between those communities with whom they continue to maintain their accustomed relations of friendship and commerce. The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties, and consequently not at liberty to favor one party to the detriment of the other."

Neutrality may then be defined as the position occupied by those states which in time of war do not take part therein, but continue friendly relations and proper intercourse with the belligerents. This is in its broad sense *state neutrality*, and is not only a right but a duty. It is also *voluntary neutrality*, as distinguished from conventional neutrality, the latter being the neutrality required by special compact or conventions from neutralized states, such as Switzerland and Belgium. It may be said that neutrality is in a certain sense the continuance of the previously existing state of affairs so far as the non-belligerents are concerned. But, as a result of experience, by growth and evolution, international law has assigned to the condition of neutrality certain rights and obligations which exist only with a state of war. Limitations

are placed upon the use of neutral ports by belligerent cruisers, some supplies are denied to them, others are given in a sparing manner. The neutral government enforces respect for the neutrality of its waters and territory, and military or naval expeditions cannot be recruited in or based from its territory. On the other hand, commercial intercourse of the subjects of neutral states becomes subject to certain kinds of loss and punishment from the belligerent who suffers by his action.

These examples show some of the changes in conditions that may be caused to neutrals by the existence of a state of war. Notwithstanding that international law, in its treatment of the rights and duties of neutrals, is occupied entirely in setting forth the changes, every restriction upon the rights of the neutral must have a clear and undoubted rule and reason. The burden of proof lies upon the restraining government.

253. Neutrality defined by Vattel in 18th century.—Neutrality as a theory and practice has been a matter of slow growth, and it was not until the 18th century that it began to appear as a tangible and impartial rule of international law. Vattel during this period gave the following definition of neutrality: "Neutral nations during a war are those who take no one's part, remaining friends common to both parties, and not favoring the armies of one of them to the prejudice of the other."¹

254. Development of neutrality in the 19th century.—The rules of neutrality were, however, more rapid in their development during the 19th century for several reasons; *first*, on account of the attitude of the United States towards neutrality in the early part of the century; *second*, on account of the permanent neutralization of Switzerland and Belgium, and their faithful observance of impartiality towards all belligerents during the century; *third*, the adoption very generally of the Declaration

¹ Vattel, III, Sec. 103.

of Paris, with the extension of protection towards neutral goods and ships and neutral rights with respect to blockades; and *fourth*, the general development of armaments so that neutrals feared belligerents and belligerents feared neutrals, and both avoided offense accordingly.

255. In 20th century.—Neutrality, as it has been developed up to the present time in the 20th century, may be defined as the impartial attitude and practice of the non-belligerent states towards the belligerents in time of war. While remaining at peace the non-belligerent states continue friendly relations and proper intercourse with both or all of the belligerents.

256. Holland on obligations of neutrality.—Professor Holland, one of the leading, if not the principal authority upon international law in Great Britain, considers the obligations of a neutral state as being of three classes, involving, respectively *abstention*, *prevention* and *acquiescence*.

I. “The first of these, *abstention*, is of a negative character, It consists of restrictions upon the free action of the neutral state, by which it is, for instance, bound not to supply armed forces to a belligerent; not to grant passage to such forces; and not to sell to him ships or munitions of war, even when the sale takes place in the ordinary course of getting rid of superfluous or obsolete equipment.”

II. *Prevention*.—“The second class of neutral obligations is of much wider scope than the first, and gives rise to a greater number of debatable questions. It is positive in character, imposing on the neutral state duties of interference with the action of belligerents and of its own subjects.”

III. *Acquiescence*.—“The third head of neutral duty is of a negative character, obliging the neutral state to acquiesce in acts on the part of belligerents which, but for the existence of war, would be unlawful and ground for redress.”²

² Holland. See Transactions of the British Academy, Vol. II, p. 58.

257. Rights and duties of neutrals.—The rights and duties of neutrals are linked together, especially so far as state acts are concerned.

For instance, the great right of sovereignty of a state gives a right which is but another phase of sovereignty applicable in war time, i. e., the right of inviolability of territory.

As to its duties they are also founded upon the general sovereign rights of a state, hence it may be well to limit our discussion to such duties arising from war conditions which are mutual upon the part of the neutrals and of the belligerents, and that are defined by international law in a general sense and made part of the municipal law by state action.

258. Belligerent acts not permissible in neutral territory.—It is a duty on the part of the hostile states to avoid committing such acts, while it is a corresponding duty on the part of the neutral to forbid and prevent such belligerent actions.

The most important of the duties that arise in this connection are grouped under the general statement that belligerent acts are not permissible in neutral territory.

Hostilities may be carried on properly in the territory of either belligerent and upon the high seas. Within the territorial land and waters of a neutral no such hostilities can be permitted.

Any territory which is not in the possession of a state is held to be in the same category as the high seas.

259. Proclamation of neutrality.—While it is not a duty on the part of a neutral state to issue any proclamation of neutrality, it has become customary to do so when commercial or other interests may be involved.

The practice of issuing such proclamation has several advantages; it calls the attention of the subjects or citizens of the state to the neutrality or corresponding laws, to the obligations and penalties of citizens arising from a state of war, and supplements the neutrality laws by announcing the atti-

tude of the government towards the belligerents, and to its own rules, particularly those as to the entry and use of its ports and waters by belligerent cruisers.

Proclamations of this kind have been issued by the Presidents of the United States from the latter part of the last century down to that of President Roosevelt in 1904 during the Russo-Japanese War, giving the duties of the nation and its citizens arising therefrom.

260. Passage of belligerents over neutral territory.—A permission given for the passage of troops of a belligerent through a neutral territory, though sanctioned by earlier writers upon international law, is now considered a warlike act and is not permitted. Given to one belligerent it is an act of partiality and favor to one of the belligerents. Given to both it is a matter which is almost if not quite impossible to arrange impartially, no matter how just may be the ideas of the neutral in the matter. As Lawrence says, "In the crisis of a great war it may be a matter of life and death to one belligerent to pass a body of troops across the outlying portion of neutral territory, whereas the other may never be placed in a similar position through the whole course of hostilities. It would be little consolation to him in the midst of defeat and ruin to be told that he would have received the same privileges as his adversary had the conditions been reversed. Moreover, the permission is of necessity given to further a warlike end, and is therefore inconsistent with the fundamental principle of state neutrality."^{*}

In 1870 the Swiss Republic refused to allow bodies of Alsatian recruits for the French army to cross her frontiers. In 1877 we made the action of the Mexican Government in pursuing some insurgents into our territory a subject of serious remonstrance.

^{*} Principles of Int. Law, 3d edn., pp. 525-526.

Cases arise when naval vessels after an engagement put into neutral ports and waters with prisoners from the captured vessels of the other belligerent detained on board during their stay. The usage in these circumstances is that the authorities of the port have no right to interfere so long as they remain on board ship. Their detention is part of the internal administration of the man-of-war which in this matter comes under the laws of its own state.

If the prisoners of war escape from the vessel the local authorities must not return them or allow any agents of the belligerents to recapture them within their jurisdiction.

261. Internment of belligerent forces in neutral territory.—

The only case in which belligerent troops are permitted to cross neutral boundaries is when they are driven over by the enemy. The practice in this case is to disarm the refugees when they have entered the neutral territory and to detain them there until the end of the war. This is called *interning*, and the troops so placed are said to have been *interned*. By convention of the Second Hague Conference in 1907 provision is made for such internment, which is to be as far as possible from the theatre of war. They may be guarded in camps or even in fortified places. Officers may be paroled not to leave the neutral territory and all expenses occasioned by the internment are to be reimbursed to the neutral state at the close of the war.

The last example of internment on land was in 1871 when a large force of French troops, the last of Bourbaki's army, were interned by special arrangement with Switzerland during the closing days of the Franco-German War. Internment of naval forces occurred during the Russo-Japanese War, in the Philippines, at Mare Island, California, and elsewhere.

It has been provided by treaty agreement, as in the case of the United States and Mexico, that the regular forces of two countries may, under certain conditions, reciprocally cross

the boundary lines of two states when they are in close pursuit of a band of hostile savage Indians.

In this agreement made in 1890 it was provided that this reciprocal crossing should be confined to certain localities, which in all cases should be in the unpopulated or desert parts of the boundary line. The pursuing forces were to retire as soon as an engagement had taken place with the hostile band, or had lost its trail, and the commanding officer of the force was obliged to give notice of his pursuit to the nearest civil or military official of the country entered.

262. Use of neutral territory in emergencies for self-protection.

—Authorities agree that some exigencies of self-defense will justify a temporary violation of neutral territory or waters. But it should certainly be confined within the strictest limits required by the necessities of the case, and an ample apology should be given to the state whose territory is violated.

The case of the "Caroline" is cited in this connection, and it rests, as all others should rest, upon the grounds given by Mr. Webster, then our Secretary of State, that the necessity of self-defense was instant, overwhelming and leaving no choice of means or moment for deliberation. Those American lawyers and publicists who justified the seizure of the "Virginia" rested it upon the same ground, but, of course, did not attempt to cover the massacre of the prisoners in Santiago de Cuba by the same reasons.

263. Neutral port as a base.—The prohibition of belligerent acts by recent conventions in neutral territory extends to the use of ports and waters of a neutral as a base for hostile operations. This includes the fitting out of warlike expeditions. Jomini gives the definition of a base of operations as a place from which an army draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds a refuge at need.

The questions arising as to neutral rights and duties in sea warfare are largely covered by Convention XIII of the Second Hague Conference, which is found in the Appendix, No. V.

264. Nature of the use of a port as a base.—Our policy is not to consider that a port must be used constantly or more than once to make it a base in a naval as well as a military sense. A cruise of a man-of-war is to an extent analogous to a campaign of a military force. The radius of operations given to a full-powered steamer with large bunker capacity may girdle the world. If in addition to this the ship fills her complement of men, refreshes those on board with the resources of the port, fills up with provisions and other stores, and by docking and repair is placed in a high state of efficiency, the vessel is in readiness to take the sea for almost any naval operation that her design will permit. The port of the neutral has served its purpose as a base, and the cruiser can, after a successful cruise or campaign against the enemy, repair to another port far removed, and from there base other hostile operations in a similar manner. The crucial test of a naval base in these days in a neutral country is not the frequency of resort but the fulness of the necessary supplies and repairs permitted. In the days of the auxiliary steamer like the "Shenandoah, a recourse to a base like Melbourne gave to this ship the opportunity to make a campaign that extended to the Arctic Ocean, and enabled a return from the North Pacific Ocean to the home base of English waters without resort to any port or to the facilities of any other base.

The supply of a belligerent cruiser in a neutral port to an unlimited extent with coals, provisions, etc., changes that port into a base. The restrictions of English ports in our Civil War, and the regulations of our government in 1870 forbade the supply of vessels with coal more than once in three months unless the vessel had resorted to a home or European port in the meantime. This is in accordance with the con-

vention previously referred to.⁴ The supply is limited to an amount requisite to take the vessel to the nearest port of its own country. The usage, though not definitely established by convention for other nations which also allows the alternative of filling bunkers, may be considered as settled for ourselves.⁵ To permit a cruiser to have a greater supply of coals, provisions and stores than the necessities of the case require is to provide her with the means for aggressive action, to make of a neutral port a base, and hence to violate the spirit of all rules of neutrality.

265. Closing of ports by neutrals to belligerents.—In order to carry out its duties of neutrality a state is obliged sometimes to resort to extreme measures, such as closing its ports (or certain of them) to belligerent vessels, limiting the stay of vessels to twenty-four hours, and to delay the departure until twenty-four hours after the sailing of the other belligerent. This is all provided for in the convention whose articles are above referred to.

These restrictions and prohibitions imposed by neutrals upon the vessels of belligerents do not extend so far as to deny the hospitality of a port in case of danger or immediate want, such as stress of weather, exhaustion of coal supply or provisions. The laws of ordinary humanity would not permit the refusal of a harbor of refuge and supply to this extent.

A complete denial of the use of ports to belligerent cruisers has been made in past history by the Austrians at Cattaro in 1854, by Sweden at various times, and by Brazil after the Wachusett affair to both Federal and Confederate vessels; also in the Russo-Turkish War by Sweden and Great Britain. These denials were based upon sufficient reasons, generally

⁴ Art. 20, Convention XIII, Appendix.

⁵ See Art. 19, of XIII Convention in Appendix.

from the infringement of neutrality regulations and rights or other circumstances as in the case of the Florida.

266. Treaty of Washington.—The articles of the Treaty of Washington are practically incorporated into this convention on neutral rights and duties in maritime war, and are to that extent binding upon the states of the civilized world.

267. Neutral pilots.—Provision in Convention XIII of the Second Hague Conference allows the use of neutral pilots on the belligerent ships, but that is of course applicable only to neutral waters and not to the open sea. Such use is equivalent to the use of other and fixed aids to navigation in neutral waters.

268. Belligerent operations in neutral waters.—It is a duty of neutrals to prevent all hostile operations afloat or on shore within its territory by force if necessary. If a vessel is captured within the waters of a neutral by one belligerent it is the duty of the neutral whose territory is violated to effect restitution and to secure reparation and redress for itself as well as for the injured belligerent.

In the case of a belligerent thus attacked the best ruling is that if the vessel has reason to believe that sufficient protection will be seasonably afforded by the neutral it should not engage in hostilities, but that otherwise it has a right to defend itself.

If, on the contrary, a vessel captured in neutral territory was the one to commence the attack she forfeits neutral intervention upon her behalf and for restoration.

In a general way a capture made in neutral waters is, in so far as the belligerents are concerned, a valid capture, but so far as the neutral state is concerned it is, however, an illegal capture and an offensive action on the part of the attacking belligerent. To the injured party the neutral should give proper reparation obtained from the attacking belligerent.*

* See Case of the *Manjur*, p. 471, Higgins.

The United States has not accepted Article 23 of Convention XIII, above referred to, with respect to the stay of prizes in neutral ports pending the decision of a prize court as to their condemnation. As to Article 3 of the same convention the United States takes the ground that a demand must be made by the neutral government upon the belligerent captor for the return of the prize made in its waters as a matter of duty.

269. Hostile expeditions from neutral territory.—Hostile expeditions can be of various natures. One form is that exemplified in the capture of the Dutch ship "Twee Gebroeders," and which became the subject of a noted decision by the celebrated English Admiralty Judge Lord Stowell. An English vessel of war in 1800 lying in Prussian waters, then neutral, sent out a boat expedition from the ship and captured this Dutch merchantman outside of the neutral jurisdiction. Lord Stowell decided this act to be improper, and that a hostile expedition could not rightfully originate in or proceed from neutral territory.

270. "Terceira" affair.—Another form of hostile expedition is that similar to what is known as the "Terceira" affair, which was as follows. In 1828 a civil war broke out in Portugal between the partisans of Donna Maria and her uncle Don Miguel. A body of troops serving Donna Maria, driven out of Portugal, took refuge in England, and with other Portuguese they endeavored to fit out an expedition in favor of their mistress. Although warned by the British Government, about 700 men under Count Saldanha sailed from Plymouth, nominally for Brazil, but really for Terceira, one of the Azores, which was still faithful to Donna Maria. Off Porto Praya they were intercepted by an English vessel of war—the "Ranger," and informed that they could not land in the Azores, but were free to go anywhere else. On the refusal of the Portuguese commander to give up his purpose or to yield

to anything but force, his vessels were escorted back to a point 500 miles from the English Channel and the "Ranger" returned to Terceira, and the expedition put into Brest and finally gave up its mission. In regard to this affair jurists generally hold that the British Government was right in regard to its view of the illegality of the expedition, as though unarmed it was regularly organized, composed of soldiers and under military command. It is, however, held by them that the method pursued to stop the expedition was wrong, as it should have been stopped before leaving British waters and jurisdiction, and not upon the high seas or in Portuguese waters.

271. Definition of a hostile expedition.—It was decided in 1870, when a large number of French and Germans returned to their respective countries to enter military service, that so long as they travelled as individuals or not organized that they did not answer to the description of a hostile expedition, even if there were large consignments of arms and ammunition to the French Government on board of the same ship which carried the French flag. This was the prevailing sentiment at the London Conference, even when the individuals are returning at the call of their government to perform obligatory services in war time.

An expedition then to be hostile and warlike should start with a present purpose of entering into hostilities; it should be under military or naval command, and it should be organized with a view to acts of war within a short period of time.

President Cleveland, in his proclamation in regard to the Cuban insurrection, dated July 27, 1896, declared that in accordance with the judicial decision of the United States Supreme Court a military expedition under our neutrality laws consists of "any combination of persons organized in the United States for the purpose of proceeding to make

war upon a foreign country with which the United States is at peace, and provided with arms to be used for such purpose," and furthermore that the providing or preparing of the means for such military expedition or enterprise includes the furnishing or aiding in its transportation.

272. Equipment and construction of vessels of war for a belligerent in a neutral state.—The accepted rules of international law provide among other duties of neutral states towards belligerents that they are not to give armed assistance to either belligerent or to allow one side privileges denied to the other. This has been extended in the course of time to a duty not to supply belligerents with instruments of warfare or with money—the sinews of war. Then follows the duty which we have already discussed in part not to permit belligerent agents, or their own subjects, to fit out warlike expeditions in their dominion or to augment therein the hostile forces of a belligerent ship or expedition. Within the limits of this obligation is included naturally and reasonably the construction and equipment of vessels of war for either belligerent; while any augmentation of military force is clearly forbidden by the rules of international law as much as the original construction and equipment of vessels of war.

In addition to the prescribed rules given in Convention XIII of the Second Hague Conference, in Articles 6, 8, 17 and 18, questions as to the construction, equipment and subsequent departure of belligerent vessels from neutral ports, are more or less covered by municipal law and regulations arising from arbitral and judicial decisions, and from opinions of advisers of the neutral government concerned.

These matters have been constantly occurring questions with the United States on account of our extensive shipbuilding facilities and many sea-ports, and also on account of our generally neutral position in European waters, as well

our proximity to the numberless insurrections and revolutions in Latin-American countries.

273. Neutrality acts.—In our Neutrality Act of 1818, codified and revised as Sections 5283 and 5285, Revised Statutes, are contained the prohibitions and punishments for furnishing, fitting out and arming vessels against people at peace with the United States, or of augmenting the force of any armed vessel in the service of any foreign prince, state, colony, district or people at war with any other prince, state, colony, district or people with whom the United States is at peace.

The Foreign Enlistment Act of 1870 of Great Britain reads that if any person within her Majesty's dominions builds or agrees to build, or issues or delivers any commission for any ship, or equips, dispatches or causes or allows to be dispatched any ship with intent or knowledge, or having reasonable cause to believe the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state, such person shall be deemed to have committed an offense against this act. This law of 1870, drawn up with the experience that had accumulated since 1818, especially that afforded by our Civil War, is more effective and definite than our own present law. The acts of other countries are more general in tone and leave greater latitude to the governments, which hence are charged with greater responsibility.

In summing up the position of the United States with regard to this question up to the time of the outbreak of the Civil War, Mr. Dana says the results of the legislative, executive and judicial proceedings of the United States may be stated as follows:

274. Position of the United States up to the time of the Civil War.—"In case of vessels already armed and commissioned by a foreign belligerent, whether public vessels or privateers, they shall not in our ports increase their capacity for hostile purposes, whether of offense or defense. This rule may be

violated by enlisting men, or by adding to the physical efficiency of the vessel, in a respect which is not purely nautical and such as a merchant vessel would not require. We have not found it necessary to restrict the stay of belligerent cruisers or their prizes in our waters to less than the terms of asylum usually allowed to public vessels in time of peace. As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the operations; but the intent with which the particular acts are done. If any person does any act or attempts to do any act towards such preparation, with the *intent* that the vessel shall be employed in hostile operations, he is guilty without reference to the completion of the preparations or the extent to which they may have gone, and although his attempt may have resulted in no definite progress towards the completion of his preparations. The procuring of materials to be used, knowingly and with the intent, etc., is an offense. Accordingly, it is not necessary to show that the vessel was armed, or was in any way or at any time, before or after the act charged, in a condition to commit acts of hostility.”¹

The difficulty with the rulings just quoted from Dana, which may be said to still largely represent our position, is the question of intention, i. e., whether it is possible to prove the intention sufficiently to make the rule a workable one.

Hall suggests as an alternative precept, which possibly may be used *additionally*, that the test be made in the character of the vessel. He would lay stress upon the duty of the neutral to prevent the departure from its ports of vessels built primarily for warlike use, if destined for the use of either belligerent—while he would not molest vessels primarily fitted for commercial purposes. This would meet probabl

¹ Dana's Wheaton, Note 215, pp. 562, 563.

the case of the greater powers, but the weaker ones, and especially the budding naval belligerents of Latin-America, would find sufficient material for their use in the merchant vessels of the present day.

Besides, the modern man-of-war of any size is so costly and complicated in its character, and so long in process of construction, that it is not an article likely to be built for a market or begun at the outbreak of hostilities. Torpedo vessels and vessels under construction before the outbreak of war would, however, come within Mr. Hall's category, which could be used to *supplement*, not to supplant, the position given by Dana.

275. Loans of money to belligerents.—First, as to the act of a state: A loan of money on the part of a neutral state to one of the belligerent states is manifestly a violation of the rules of neutrality and impartiality. Few things represent so much in war as money; it is contraband of war, and contributes directly and most effectively to the carrying on of the war in many senses.

A guarantee of a war loan made either by individuals, corporations or by other states on the part of a neutral state in war time, is also a violation of neutrality.

But loans of money regularly made by individuals of neutral states to a belligerent government as a matter of investment or speculation is a business transaction which the neutral government has no right or obligation to prevent, and for which the belligerent cannot complain or punish the neutral individual.

During the Chino-Japanese and Russo-Japanese Wars the Governments of China, Russia and Japan were tendered loans of money from individuals and syndicates of European investors.

There is also a difference between voluntary subscription and commercial loans to a belligerent government. The law

officers of the British Government, in 1823, gave an opinion that voluntary subscriptions were inconsistent with neutrality, but loans, according to the opinions of writers on international law and the prevailing practice, would not be a violation of neutrality. Even though voluntary gifts and subscriptions are held to be in violation of neutrality, the neutral government whose citizens commit such acts is not considered as having committed a hostile act towards the other belligerent.

276. Money to relieve suffering.—Subscriptions and donations of money and material by citizens of a neutral state to relieve suffering and famine in a belligerent state are not inconsistent with neutrality. During the Franco-German War large sums of money were sent from both Germans and French in the United States for the relief of the sick and wounded in the hospitals of their respective countries.

An opportunity presented to belligerents by a neutral state to buy discarded or surplus arms, munitions of war or ships, is an improper one. The existence or probable outbreak of war makes such a sale of arms improper, and the good faith of the government concerned becomes involved.

During the Franco-German War both belligerents went to England for the "sinews of war," and both the French loans and one for the Germans were issued in England.

CHAPTER XII.

BLOCKADE IN TIME OF WAR.—CONTRABAND OF WAR.

277. Blockade.—Blockades may be either military or commercial, sea or land.

278. Military blockades.—As military blockades they may consist of land blockades or investments of an inland town or land investments accompanied by sea blockades of a port, or by a masking and containing of an enemy's fleet by another fleet off a military port, naval arsenal or an anchorage where commerce does not exist.

279. Commercial blockades.—A commercial blockade may be of one or more sea-ports or of an entire coast or island in all cases belonging to or occupied by the enemy.¹ It may be also of the entire sea frontier of an enemy with a view to cut off external supplies and foodstuffs as well as vital imports. Notwithstanding occasional efforts to abolish blockades they remain major operations, and are likely to be used whenever the circumstances require it, and when the belligerent desiring it has that naval superiority which alone permits its establishment and continuance.

The circumstances of a land blockade are so different from that of a sea blockade as to take it out of consideration of the class of blockades about to be treated. A land blockade is carried on upon territory which is for the time being under the jurisdiction of the blockading force, and hence matters purely of an international character do not appear; but a maritime blockade exists not only before a commercial port or

¹ Art. 1, Decln. of London, see Appendix.

ports which are open to international trade, but extends over marginal waters through which innocent passage of neutral vessels is allowed, and by which it reaches the high seas, the common territory and highway of all nations. This fact makes the question of sea blockade one closely connected with the trade and shipping of neutral nations; in fact, as a rule, those who are generally engaged in the evasion of blockade in vessels of any size are apt to be neutral subjects; and the questions concerning sea blockade are hence questions largely international in law and scope.

280. Effect of blockades.—It has been claimed that the effect of the cessation of trade caused by blockades will cause more harm to the neutrals than good to the belligerents. That depends, of course, upon the situation of the war and the circumstances of the case. When the land frontiers of a country touch those of civilized and neutral states with connecting railway systems the injury to the belligerent blockaded is not so great; but if the sea-ports are the principal means of communication with the outside world, and the neighboring neutral state or states are poor and undeveloped, the effect of a general blockade, as was the case with our Southern States, is powerful and wide-reaching, and may become the determining war factor.

281. Blockade must be between belligerents.—A blockade being an act or operation of war, it can be established only by a state or belligerent, but is not conventionally accorded to a state of insurgency alone. The United States refused, for instance, to recognize the establishment of a blockade by the Brazilian insurgents of the port of Rio, notwithstanding their control of the waters of that vicinity.

Besides sea-ports and roadsteads, rivers can, of course, be blockaded at their mouths, but if a river is bounded partly by neutral territory or leads to internal neutral ports or countries it cannot be blockaded. The Federal Government, for

instance, during the Civil War could not blockade the Rio Grande, as there were ports upon that river situated in neutral territory.

The establishment of a blockade being an act of sovereignty of great importance, especially as it interferes with the power of trade of neutrals, should be instituted directly only by the government of the belligerent or by a commander-in-chief in its name to whom the power of establishing a blockade has been directly or indirectly delegated.*

282. Blockades must be notified.—It is necessary that a neutral shall have knowledge of a blockade before he can suffer any consequences for a violation or attempted violation of such blockade. By the Declaration of London this notice can be conveyed in several ways.* The blockading power may give notice by a public proclamation or notification to the authorities and consuls of the ports blockaded, and to the governments of the neutral states, either direct or to the diplomatic representatives accredited to the blockading government, or special notice at the early establishment of the blockade may be given to a neutral vessel. In addition, the notoriety of the fact has been considered as sufficient notice in cases like our Southern blockade. A notice to a foreign government is a notice to all of the individuals of that state, as it is the duty of the foreign government to convey the notice to all of their subjects or citizens.

Besides the notice of the establishment of a blockade it is required that the blockading belligerent should give notice of the formal and final discontinuance of the blockade. This is no more than fair to neutrals and their trade.

283. Specifications of declaration of blockade.—Certain specifications must be made in the declaration of blockade as to the

* Art. 9, Decln. of London, Appendix.

* Arts. 8 to 16, Decln. of London.

date of beginning, geographical limits and the period in which vessels are allowed to come out.

284. Manner of notification in past times.—There was a difference in the practice of nations in the past as to the amount and manner of notification of a blockade. This difference followed the general lines of difference as to practice in maritime war—the Continental idea as opposed to that generally followed by Great Britain and the United States.

The Continental or French practice was to give a diplomatic notice to the neutral governments of the blockade and also an individual notice from a vessel of the blockading force at the port. Each neutral vessel was to be warned off, and the warning indorsed upon the certificate of nationality or some other of the ship's papers with date, locality, etc. A repeated attempt to enter then subjected the vessel to capture.

Our own practice was that also of the English in general. It recognized as valid two forms of blockade: one in which notice had been duly given and which was effectively established and one *de facto*, which began and ended with the actual establishment. In the former case, after due general notice, ignorance of the blockade was not an excuse for a departure for the blockaded ports or for an appearance in its vicinity. Being bound to a blockaded port, or being manifestly out of a course to its port of destination, was considered evidence generally of an intention to violate the blockade.

As to a *de facto* blockade, local and more temporary in nature, a vessel was not seized for attempting to enter a harbor unless it had been previously warned off.

By the Declaration of London, it is required to notify the authorities and consuls of the port blockaded concerning the establishment of the blockade. The cessation or the re-establishment of the blockade must be notified in similar manner.

In this declaration is carried a renunciation of the Conti-

mental doctrine of a special notification on the spot for each vessel. The liability of a neutral vessel to capture for breach of blockade being contingent on her knowledge, actual or presumptive, of the blockade.*

Article 15 says: Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time.

The first part of Article 16 reads: If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade the notification must be made to the vessel itself by an officer of one of the ships of the blockading force: This notification should be entered in the vessel's log-book, and must state the day and hour and the geographical position of the vessel at the time.

285. Duration of liability of blockade-runner to be captured.—

In the adopted articles of the Declaration of London a considerable change was made from the extreme view contained in the usual Anglo-American doctrine as to the duration of the liability to capture of a blockade-runner. This liability extended according to that doctrine from the departure from a home port or the initial point of voyage until a return to the same point. Not only was this not accepted by continental authorities but modern conditions had made it most annoying and vexatious to any neutral that could be involved in suspicion as to breach of blockade. The practice of attempting to enforce a blockade existing on the coasts of Northeastern Asia or Southeastern Africa in the waters of the Mediterranean was not only highly resented by those not holding the Anglo-American doctrine, but it was equally vexatious when applied to English and American vessels either

* See Art. 14, Decln. of London, Appendix.

in the Atlantic or Mediterranean. England led off in the conference by yielding as to this doctrine, and the United States delegation was ready to follow, provided proper restrictions were retained and the military value of a blockade, still one of the most powerful of naval weapons, were not lessened. Our own experience with blockade during the Civil War had given us a remarkable knowledge of its value and scope that practically exceeded all other modern examples. That no blockading vessels for instance might be seen from the blockaded port is not only a condition inherited from our own and the latest wars, but was practiced even so far back as when Nelson lay off Genoa. The whole of this was settled by the third article, which made the question of effectiveness a question of fact, not of visibility or force.

Fortunately, a happy solution of the matter of liability to capture was also found in prescribing that the pursuit of the blockade-runner should begin only within the area of blockading operations, and the capture limited to that area, or in the course of a pursuit initiated within that area. This area in extent is governed by the requirements of the blockade for each place, but must be covered by the presence of a sufficient number of vessels so arranged by the commander of the blockading force as to make the blockade most effective.⁵

In the general report upon the Declaration of London the following statement as to the extension and elasticity of blockades made by Admiral Le Bris of the French Navy met with general approbation:

“Cases may occur in which a single ship will be enough to keep a blockade effective; for instance, at the entrance of a port or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself

⁵ See Arts. 17, 18 and 20; Decln. of London, Appendix.

near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider, and extends further from the coast. It may therefore vary with circumstances, and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured."

To this statement the American delegation added "that the nature of the area of operations varied with geographical conditions, the proximity of neutral ports and the interests of neutral commerce as well as with the force employed." As an explanation of a great distance that might be required to be covered, attention was called to the fact that breach of blockade had become almost entirely a night operation; and that the capture of a vessel that had successfully cleared the entrance of the port could best be effected as she emerged at daybreak from the zone of darkness, and here naturally one of the outer lines of a blockading force would be placed. Hence with sixteen hours of darkness and thirty knots speed that might well be 480 miles off shore or distant from the blockaded port.

286. Pursuit of a blockade-runner.—As to the question of pursuit the American delegation stated that its interpretation of pursuit was that continuous pursuit did not necessarily mean by the same vessel, but that it could be started by a vessel from one line, to be taken up in succession by one from another line, and so on in succession, allowing the vessels of the various lines to be in a more or less established position. To this interpretation printed with the proceedings no opposition was offered.

In the general report (explanatory of the article) it is also stated that the question of abandonment of pursuit is one of fact; seeking refuge from pursuit in a neutral port does

not end pursuit when such refuge is sought only for safety from pursuit. The pursuing ship can wait until the departure of the pursued ship from the neutral port so that the pursuit in this case is suspended, but not abandoned. Article 19 exempts a vessel bound for a non-blockaded port from capture for breach of blockade, no matter where she or her goods are ultimately bound. This article prevents the application of the doctrine of continuous voyage to blockade.

287. Effective blockades.—One of the best definitions given as to an effective blockade is that found in the treaty between Italy and the United States of 1871, which states that “a blockade to be legal must be so invested as to create an evident danger to attempt to enter the port.”

The actual force necessary to keep an effective blockade varies with the circumstances. Attempts to regulate it by treaty are unsatisfactory. The naval force can be assisted by batteries on shore or the main reliance can be of shore batteries assisted by a naval force sufficient to warn off or pursue any vessels attempting to run the blockade. It is not necessary that vessels should be invariably kept out of the port. An occasional evasion does not prevent a blockade from being considered effective in the terms of international law.

288. Nelson blockading Genoa.—Reference has been made to Nelson's blockade of Genoa. In Mahan's *Life of Nelson** it is stated that “fault was found with the blockade of Genoa on the ground that it did not comply with the requirements of international law,” the complaint resting, apparently, on the statement that the blockaders could not be seen from Genoa. Nelson replied that the proof of evident danger to vessels seeking to enter or leave rested on the fact that captures were made; and it is, on the face of it, absurd to say that there can be no danger to a vessel seeking to enter a

* *Life of Nelson*, Mahan.

blockaded port because the blockading vessels are not visible from the port. Much more depends upon their number, disposition and speed. "From my knowledge of Genoa and its gulf," said Nelson, "I assert without fear of contradiction that the nearer ships cruise to Genoa the more certain is the escape of vessels from that port or their entrance into it insured. I am blockading Genoa, according to the orders of the Admiralty, and in the way I think most proper. Whether modern law or ancient law makes my mode right, I cannot judge; and surely of the mode of disposing of a fleet, I must, if I am fit for my post, be a better judge than any landsman, however learned he may appear." This is nautical common sense, and is in accord with the best practice. Such empirical rules, prescribing numbers of vessels, their situations, etc., as Continental powers have made in the past are not practical. As Lawrence says, "We are often told, for instance, that the blockading vessels must be stationary, sometimes that they must be anchored, and even that the approaching ship must be under the cross-fire from at least two of them. These statements are among the curiosities of the literature of international law, but they have no connection with the hard facts of international relations."¹ I may add, also, of present sea blockades.

A blockade is not regarded as raised during the temporary absence of the blockading squadron, owing to bad weather.

289. Closing channels by artificial mines.—It is not illegal to close some of the channels to a harbor by mines, hulks or other obstructions. It is legitimate warfare, notwithstanding the protest of Earl Russell as to Charleston in 1861. If a belligerent, as an English writer says, can knock a fortified port to pieces by bombardment he certainly can obstruct or destroy their approaches by sea.

If a home port is in possession of rebels or an enemy,

¹ Lawrence's principles, 3d edn., p. 574.

trade with it cannot be stopped so far as neutrals are concerned by municipal regulation. It must be done by the belligerent operation of blockade. So long as the domestic port is taken from the government by force, its trade must be stopped by an effective blockade or the port regained by force.

If the belligerent captures or recovers a port, then the blockade is held to cease, as the belligerent can cause the trade of the port to be stopped by municipal regulation. After the capture of the blockaded port any neutral bound to that port becomes innocent and not liable to capture.

290. Breach of blockade.—A breach of blockade consists of an actual entrance or egress, or an attempt to enter the blockaded port, knowing it to be blockaded. An *attempt* to enter is as much a breach of neutrality and blockade as an actual entrance into the port.

This attempt is now limited to the movements of the ship off the port or within the area of operations.

If a neutral vessel is driven into a blockaded port by stress of weather she is not liable to capture, provided she communicates properly with an authority outside and receives his acknowledgment of the fact and does not discharge or receive cargo—it must be brought out intact. The necessity, however, must be evident and pressing. Neutral vessels of war can be allowed to enter and depart from blockaded ports, but this requires the permission of the commander of a blockading force, which must be given impartially.

A license from the government or proper authorities of the blockading state is sufficient justification to enter a blockaded port, but a blockade must be applied impartially to ships of all nations. If there is reason to believe that a neutral government is about to go to war with the blockaded state a vessel of that nationality may properly be permitted to leave the blockaded port.

The penalty for a breach of blockade is a capture and confiscation of the offending ship and its cargo. If the owner of the cargo is not owner of the ship and can prove that at the time of shipment he neither knew of the intention to violate the blockade of the port nor could have known of it the cargo can be released. The burden of proof rests, however, with him. Capture is no longer possible when the blockade has been raised.

In closing this discussion of the question of blockade in time of war it is understood that the Declaration of London gives the consensus of opinion of great maritime powers of the world, and is of authority whether the declaration is generally ratified or not. If it should be ratified it is binding to the signatory powers which included all the states taking part in the conference. If it should not be ratified it represents an authoritative statement on the part of a body of competent persons duly appointed by their governments as such.

291. General laws of contraband of war.—"The right of the belligerent," says Mr. Richard Henry Dana, "to prevent certain things getting into the military use of his enemy is the foundation of the law of contraband; and its limits are, as in most other cases, the practical results of the conflict between this belligerent right on the one hand, and the right of the neutral to trade with the enemy on the other.

"Belligerent interests might well contend that any merchandise sent into his enemy's country gives that enemy aid or relief, moral, financial or physical. But to prevent such trade would be to end all neutral commerce. Neutral interests therefore insist on the strictest limits of the war right of seizure, and have, at times, striven to confine the rule to instruments which are completed and are for exclusively military use. The result of this conflict has left rather an undefined and irregular line. Articles of doubtful use the belligerent seeks to condemn on evidence or presumptions that

they were in fact intended to be, or would in fact become, whatever the intent, a direct contribution to the military force of his enemy. The chief maritime belligerents have enforced this right, while the chief neutrals have argued against it, in their books and diplomatic letters, and sought to restrict it in their treaties. So where articles are not of a military character, but suitable for household food, as breadstuffs, the belligerent claims the right to capture them if bound to a port under the stress of actual siege, where the fate of the place may depend on the mere question of food. The ground is that the circumstances necessarily bring the food into the category of a direct supply of the military necessities of the enemy.”*

292. Contraband trade.—Contraband *trade* may be defined as a trade with a belligerent with the intent to supply him with military or naval supplies, equipments, instruments, arms or armaments.

293. Contraband goods.—Contraband *goods* are those munitions of war or articles which are designed or capable of use as a support or assistance to the enemy in carrying on an offensive or defensive land or maritime war.

294. Classification proposed by Grotius of articles of trade with a view to warlike use.—Grotius, in his celebrated work, divides articles of trade or commerce into three classes, which division maintains to the present day in the classification of contraband of war:

1st. Those articles that are useful solely for war purposes, such as arms, warlike ammunition, etc.

2d. Those articles that cannot be used for war purposes, such as pictures, statuary, etc.

3d. Those articles which can be used for warlike or peaceful purposes, such as money, provisions.

* See Dana's Ed. of Wheaton.

The first class is prohibited to neutrals, the second class is permitted, while the third is permitted or prohibited according to circumstances.

In using the expression *permitted* or *prohibited* it must be borne in mind that contraband trade is not illegal so far as the neutral state is concerned, unless it be in the shape of a sale, equipment or augmentation of force of a man-of-war.

295. Prevention of contraband trade.—The prevention and repression of such trade falls to the lot of the belligerent as the most interested, and is done mainly by confiscation, after capture, in regular form and trial if at all possible. The capture must be made, of course, upon the high seas or within territorial limits under the control of the offended belligerent. The neutral may or may not warn his subjects of the penalty and result of the contraband trade, but all such trade is carried on at the risk of the neutral and without the protection of his state.

Contraband trade carried overland cannot be stopped by belligerent forces, so that the question of dealing with such trade and transport becomes one upon the high seas and adjacent waters, and one with which officers of the navy are concerned as belligerents.

296. Importance of the evidence of contraband, etc.—As capture can be made only under the laws of international law, and condemnation follows and is determined for the present by the action of the prize courts of the belligerent captor, whose interpretation and application depends greatly upon the facts evolved, it must be borne in mind that the question of sufficient evidence is a vital one. The officers of the belligerent cruiser must then be sure of their ground, as they deal with neutrals whose property is involved to a large degree.

297. Classification of contraband.—What is and what is not contraband? Lawrence says: "It is evident that no authori-

tative list of contraband articles can be compiled from treaties. An examination of the works of publicists reveals a similar divergence and leads to a corresponding conclusion. But amid conflicting views it is possible to discuss two main tendencies. The first, which favors a long list of contraband goods and leans to severity in dealing with them, may be called English, since its chief defenders are to be found among the jurists and statesmen of Great Britain. The second deems comparatively few articles to be contraband, and is inclined to treat all doubtful cases with leniency. As its chief supporters are French, German and Italian writers it may be called European. In this matter, as in so many others connected with maritime law, America occupies an intermediate position. In her treaties and her state papers she has generally followed European, and especially French models; while her courts and her legal luminaries have, as a rule, supported English views.”*

298. Contraband of war as decided upon by the Declaration of London.—It is in this matter, as determined upon by the International Naval Conference of London, that the greatest success of the conference was marked, both in a universal sense and in regard to our own usage and interests.

In this declaration it will be found that the usual distinction is preserved in the classification of articles of absolute and conditional contraband, lists of which have been duly formulated and agreed upon. To these lists has been added a third, liberal and well defined, containing articles which were under no circumstances, during the life of the declaration, to be considered as contraband of war.

The chapter of the declaration treating of this most important and difficult subject commences with the article numbered as Article 22, which contains the list of articles that

* Lawrence's Principles, 3d edn., p. 606.

are to be considered without further notice as absolute contraband. Articles classed as absolutely contraband are such articles that would come within the scope of the first class named by Grotius, as given upon a previous page. The list comprised within Article 22 is also the one agreed upon at the Second Hague Conference of 1907 by the committee charged with the subject and virtually, but not formally adopted by the principal powers there represented. The principal articles which might be considered as debatable in this list are those under the number seven, which read: "Saddle, draught and pack animals suitable for use in war." It must be borne in mind, however, that although with us horses have at times been considered as conditional rather than absolute contraband, that with most of the European countries all horses and animals of burden within the state, whether privately or publicly owned, are considered as so much actual or possible military material, available for use of the state in war time. In fact, in some states an annual or periodical census of such animals is taken with that view.

The list of absolute contraband without notice is as follows:

- (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
- (2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
- (3) Powder and explosives specially prepared for use in war.
- (4) Gun mountings, limber boxes, limbers, military wagons, field-forges, and their distinctive component parts.
- (5) Clothing and equipment of a distinctively military character.
- (6) All kinds of harness of a distinctively military character.
- (7) Saddle, draught, and pack horses suitable for use in war.

(8) Articles of camp equipment, and their distinctive component parts.

(9) Armor plates.

(10) War ships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

If, in the course of time, other articles than those given in this list may be developed for war uses exclusively, it is provided that they may be added to it by a declaration from one or other of the belligerents duly addressed to the other powers.

The second list—of conditional contraband—is of those articles, susceptible of use in war or for peaceable purposes, that are to be treated without further notice as contraband of war when destined for the enemy's forces. This list, contained in Article 24, is as follows:

1. Foodstuffs.
2. Forage and grain, suitable for feeding animals.
3. Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
4. Gold or silver in coin or bullion; paper money.
5. Vehicles of all kinds available for use in war, and their component parts.
6. Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.
7. Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs, and telephones.
8. Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.

9. Fuel; lubricants.
10. Powder and explosives not specially prepared for use in war.
11. Barbed wire and implements for fixing and cutting the same.
12. Horseshoes and shoeing materials.
13. Harness and saddlery.
14. Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.

In the running commentary of the general report an explanatory statement was agreed upon that *foodstuffs* include products necessary or useful for sustaining man, whether solid or liquid, which would include wines, etc.; and that *paper money* only includes such convertible paper money as bank notes which may or may not be legal tender. Bills of exchange and cheques are excluded. *Engines and boilers* are included with vessels, craft and boats, while *railway material* includes fixtures (rails, bridges, etc.) as well as rolling stock.

The third list, generally known as the free list, is preceded by Article 27, which states that articles which are not susceptible of use in war may not be declared contraband of war. It is stated that the following named articles may not be declared contraband of war:

1. Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.
2. Oil seeds and nuts; copra.
3. Rubber, resins, gums, and lacs; hops.
4. Rawhides, and horns, bones, and ivory.
5. Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
6. Metallic ores.
7. Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.
8. Chinaware and glass.

9. Paper and paper-making materials.
10. Soap, paint and colors, including articles exclusively used in their manufacture, and varnish.
11. Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
12. Agricultural, mining, textile, and printing machinery.
13. Precious and semi-precious stones, pearls, mother-of-pearl, and coral.
14. Clocks and watches, other than chronometers.
15. Fashion and fancy goods.
16. Feathers of all kinds, hairs, and bristles.
17. Articles of household furniture and decoration; office furniture and requisites.

Likewise the following may not be treated as contraband of war:—

1. Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30 (i. e., to an enemy).

2. Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

A great element in the matter of contraband is the question of destination. This not only makes or unmakes conditional contraband, but also brings in the question of continuous voyage, one of the most troublesome of questions connected with contraband and concerning which there was probably the most radical difference of opinion. Its connection with the Civil War and the subsequent controversy as to this doctrine of continuous voyage has gathered around it a great sentimental value not justified by its practical worth in these later days as a military weapon and regardless of its detri-

mental character to us as neutral traders and furnishers of foodstuffs.

Applied to foodstuffs and fuels it is a matter of great difficulty of enforcement, as such cargoes when imported in bulk into neutral countries go at once into the common stock of those countries and are not earmarked for the use of an enemy beyond neutral borders. This difficulty cannot be said to occur with respect to the doctrine of absolute contraband, the character of such warlike stores designed for war alone, and for special national service, gives a distinct clue to its destination. As a general compromise upon the subject the doctrine of continuous voyage was accepted for the first time by several nations, in connection with the carriage of absolute contraband, while given up by us and others with respect to blockade and the carriage of conditional contraband.

Articles 33 and 34 of this Declaration discuss and define the destinations which make the article carried conditional contraband. Article 35 was framed to exclude the question of continuous voyage from being applied to conditional contraband. The wording of the article as shown by the general report was to prevent conditional contraband being liable to capture if bound for other than enemy territory, or, in other words, preventing the application of continuous voyage to conditional contraband bound to neutral ports. If the country at war, however, has no seaboard, a cargo bound to the enemy forces using an intervening port or sea-board country under Article 36 is liable to seizure, as the neutral port of destination in this case is construed to be an enemy port, being the only sea approach existing.

In Article 40 a much discussed question was settled as to the liability of the contraband carrier as well as the contraband goods to condemnation. By the law of nations at the close of the 18th century the act of carrying materials of war to a belligerent was regarded as a wrong for which both ves-

sels and cargo were liable to condemnation. Since then the proportionate amount of contraband in the cargo to cause condemnation of the ship has varied with different countries; the general idea being that if the contraband part should be sufficiently large to make its carriage a determining factor in the voyage of the ship that its mission should be construed as a hostile venture and distinctively giving forbidden aid to the enemy. In some countries one-fourth of the cargo being contraband the ship was considered confiscable. With us the tendency has been to limit the confiscation of the ship to cases where fraud or bad faith on the part of the master or owner was discovered. It was generally claimed, however, and admitted at the London conference that in certain cases the confiscation of the contraband and the innocent part of the cargo belonging to the owner of the contraband was not enough. Finally, it was agreed that the degree of culpability should be judged by the proportionate contraband part of the cargo, and that part should be more than one-half of the cargo. As to the mode of reckoning, I can do no better than give the words of the distinguished General Reporter, M. Renault. He says:

“Must the contraband form more than half the cargo in volume, weight, value or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted the master will ship innocent goods occupying space or weight sufficient to exceed the contraband. A similar remark may be made as regards the standard of value or freight. The consequence is that in order to justify condemnation it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but, on the one hand, any other system would make fraudulent calculations easy, and on the other, the con-

demnation of the vessel may be said to be justified when the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified.”¹⁰

In Article 44 of the Declaration of London upon this subject it is provided that a neutral vessel carrying less than half contraband, and hence not subject to condemnation, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent vessel of war, whose commander is at liberty to destroy the contraband thus handed over to him. The master must give the captor duly certified copies of all relevant papers. This does not go as far as some of our treaties upon the subject; especially an old one with Prussia, still considered in force by the Empire of Germany. This requires the payment of the ruling market price of contraband goods at the enemy port to which the German vessel is bound, for all contraband surrendered. The loss by detention, etc., to the contraband carrier during such a transfer is to be paid also by the belligerent vessel of war. This treaty virtually creates a trade in contraband for which the belligerent must pay under circumstances which create an abnormal market rate.

¹⁰ A. J. I. L. Int. Naval Conference of London, Stockton, pp. 606, 607, 608, 609, etc.

CHAPTER XIII.

UNNEUTRAL SERVICES.—DESTRUCTION OF NEUTRAL PRIZES.— TRANSFER TO NEUTRAL FLAG.—CONVOY.—ENEMY CHARACTER.

299. Unneutral services.—The carrying of persons and dispatches for belligerent purposes was often classed under the head of contraband of war, but these acts are really not contraband acts. They are called by Hall analogues of contraband, but the term now in use, originally suggested by Dana, is unneutral acts or services.

These acts differ from contraband acts by a closer connection with belligerent movements; they are more directly warlike than contraband trade, and the association and identification with the enemy becomes more positive and aggressive. In fact, as the title suggests, they are more in the nature of service than any contraband transport of more or less warlike material.

While a contraband trade may simply be a continuation of commerce which is legitimate in time of peace, it seldom occurs that neutrals undertake to transport in time of peace troops of war for another nation, while a forwarding of hostile dispatches as such implies a warlike act.

No neutral ship would, for instance:

1. Transmit or repeat certain messages or information to or for a belligerent.
2. Carry certain dispatches for a belligerent.
3. Transport certain persons in the service of a belligerent.
4. Accompany naval or military forces as auxiliaries, that is, as colliers, supply or repair vessels.

300. Transmission of intelligence for an enemy.—If a neutral vessel is used by the enemy to repeat signals made between two fleets or portions of a fleet or from shore to fleet, it is manifest that such vessel is serving one belligerent to such an extent that the other can but regard her as an enemy vessel and treat her so while she is engaged in this unneutral service.

In the same manner a vessel which is engaged in laying a telegraph cable in war time for exclusively war purposes in the interest of an enemy is serving one belligerent most effectively at the expense of the other. These vessels, under the rules of the Declaration of London, are subject to condemnation and treatment as if they were enemy merchant vessels.

301. Cutting of cables.—The cutting and splicing of the South American cable off Iquique during the civil war in Chile was a matter of another kind. In this case the cable was American property laid for commercial purposes. The *de facto* and recognized Government of Chile, with whom the cable company had contracted to keep open the line under certain conditions, found itself cut off by the cable station at Iquique, at the time in the possession of the Congressionalists. In order to open communication for the government at Santiago, it was found necessary to cut the cables leading to Iquique and splice the line at sea, which was done under the protection of Admiral McCann and some of his vessels. At that time the United States had not recognized the belligerency of the Congressionalists. With such a belligerency recognized, the right of a belligerent to cut a cable that is used to transmit information or dispatches of a hostile nature seems, in the light of recent events, well established. It may well be an important hostile measure.

302. Carriage of dispatches.—The carriage of certain classes of dispatches for a belligerent is forbidden. These classes are military or naval nature, and are between a belligerent

government and the officials of its colonies and dependencies. Diplomatic and consular dispatches may be carried without a performance of unneutral service, or without subjecting vessels to the penalties of such service.

In the case of the "Caroline," an American vessel, captured by a British cruiser in 1808, when on a voyage from New York to Bordeaux, Lord Stowell, the greatest, perhaps, of England's admiralty judges, rendered the decision freeing the ship, notwithstanding she carried dispatches from the French minister at Washington and a French consul to the French Government at home.

In giving the decision he laid down the rule that the "carrying of dispatches for the enemy by a neutral was illegal; and defined dispatches as official communications of official persons on the public affairs of the government; but," he said, "the neutral country has a right to preserve its relations with the enemy, and you are not to conclude that any communication between them can partake, in any degree, of the nature of hostility against you."

Private letters and communications relating to business affairs are not considered as forbidden to neutral vessels when bound to or from belligerent ports. They are *prima facie* innocent in their character.

Mail steamers carrying the flag of a neutral and under contract with a neutral government to carry the mail cannot be held to be otherwise than innocent in carrying a large quantity of mail within which may be dispatches and information of service to a belligerent. Certainly, the owners and captains of such vessels cannot be held responsible for the contents of the mail bags which they carry, and they would violate the trust imposed upon them if they even endeavored to ascertain the nature of the communications which they carried. Hence, they are exempt from confiscation. In Article 1 of the convention adopted at the Second Hague Con-

ference in 1907, relative to certain restrictions on the exercise of the right of capture in maritime war, it is stated that the postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral or enemy ship at sea is inviolable. If the ship is detained the correspondence is forwarded by the captor with the least possible delay. This does not apply, however, to correspondence captured while violating a blockade.

303. Transport of persons by a neutral.—A neutral merchant vessel comes within the forbidden limits by the Declaration of London if it carries on board an individual or individuals embodied in the armed forces of the enemy. Such person may be made a prisoner of war by the opposing belligerent, even though there be no ground for the capture of the vessel.¹

In the case of the "Orozembo," a neutral American vessel, Lord Stowell condemned the vessel because she was chartered to take three military persons of distinction and two court officials of the Dutch Government, a belligerent, to Batavia. There were also on board a lady and some persons in the capacity of servants, making in all seventeen passengers. He held that the vessel acted as a transport, notwithstanding the small number of people on board, using the words "To send out one veteran general of France to take command of the forces at Batavia might be a much more noxious act than the conveyance of a whole regiment."

304. Classification of unneutral service at sea by the Declaration of London.—Unneutral service is classified by the Declaration of London under two heads; under the first, a neutral vessel will be condemned and will in a general way receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband. Under the second head (Article 46) a neutral vessel is liable to condemnation, and in a general way

¹ Art. 47, Decln. of London, Appendix. Also Moore's Digest, Vol. 7, pp. 756, 757.

liable to the same treatment as an enemy merchant vessel for certain specific acts of greater gravity and more direct and valuable service to the enemy. Under the first head comes (1) neutral vessels on a voyage specially instituted with a view to the transport of individual passengers who are embodied in the armed forces of the enemy or with a view to the transmission of intelligence in the interest of the enemy; (2) neutral vessels with the knowledge of either the owner, the charterer or the master that are transporting military detachments of the enemy or one or more persons who, in the course of the voyage directly assists the operation of the enemy.

In the cases specified goods belonging to the owners of the vessels are likewise liable to condemnation. These penalties do not apply if the vessels are not aware of the existence of war.

Neutral vessels under the second head are (1) those who take direct part in the hostilities; (2) neutral vessels under the orders or control of an agent placed on board by the enemy government; (3) neutral vessels in the exclusive employment of the enemy government; (4) neutral vessels at the time exclusively devoted either to the transport of enemy troops or to the transmission of intelligence in the interest of the enemy.

At the London Conference an attempt was made to incorporate the doctrine of the rule of 1756 by a proposition to treat as unneutral service the engagement of a neutral vessel, with the consent of the government of the enemy, in a trade forbidden in time of peace. This doctrine which would apply directly to our coasting trade and also to the trade with our insular possessions is not unneutral service when the service consists of innocent trade without military bias.

Two cases bordering upon the question of unneutral service may well be mentioned as matters of interest.

305. Case of the "Trent."—The first case, that of the "Trent," occurred on November 8, 1861. The "Trent," an English

mail steamer, making a passage from Havana to St. Thomas, was stopped in the Old Bahama Channel by the U. S. S. "San Jacinto," under the command of Captain Wilkes, and Messrs. Mason and Slidell, on their way as agents of the Confederate Government to France and England, with their secretaries, were taken on board the "San Jacinto" by force and held there as prisoners until the vessel reached Boston, where they were transferred to Fort Warren. The "Trent" was allowed to proceed upon her voyage, but great warlike feeling was aroused on both sides of the Atlantic. A demand was made for the return of Mason and Slidell by the British Government, with a suitable apology. The offense against Great Britain, in her view, arose from the fact that four individuals were taken out of a British ship on the high seas, pursuing an innocent voyage from one neutral port to another.

These Confederate agents were surrendered to Great Britain by Mr. Seward; the grounds stated being that they were contraband of war, but that they could not be legitimately separated from the ship which should also have been seized and sent to a prize court for adjudication.

Earl Russell, in answer to this, said that the persons captured were not contraband of war, as the "Trent" was pursuing a regular voyage and was bound for a neutral port, and that the office and character of the persons captured were not of a contraband character.

Mr. Thomas L. Harris, an American writer, in a book published a short time since, and devoted wholly to the narrative and discussion of the "Trent" affair, sums up very cogently the whole affair. To him, the following general conclusions seem to be warranted:

1. The commissioners were not contraband of war in any sense of that term.
2. Their dispatches being of a non-military character were not contraband of war.

3. A neutral power is entitled to hold necessary informal relations with an unrecognized belligerent.

4. The "Trent" had in no way violated her duties as a neutral ship when she was stopped by the San Jacinto.

5. Captain Wilkes had an undoubted right to stop and search the "Trent" for contraband of war. In the absence of anything of this character resistance to the right of search alone would have made the "Trent" liable to capture.

6. In any event, Captain Wilkes had no right to seize the persons or dispatches of the Confederate commissioners while they were on board the "Trent" on the high seas.

7. Viewed solely from the standpoint of international law, sound reasons were not given for the surrender of the commissioners by Secretary Seward.

306. Case of the "Kowshing."—The case of the "Kowshing" was as follows: The "Kowshing" was an English steamer engaged in the Chinese coasting trade under the management of Jardine, Mathieson & Company. She was chartered by the Chinese Government before the outbreak of hostilities with Japan, but at the time of the controversy and during the strained relations existing just before hostilities, to carry troops from Tientsen to Korea. In this capacity she was one of ten transports engaged in similar service, though for different parts of Korea. It has been stated, and generally believed, that the "Kowshing" was chartered at war risks, and with indemnity promised in case of loss by enemy. As a matter of fact a compensation was afterwards paid at the demand of the English Government by the Chinese Government to the sufferers on board who were English subjects.

The "Kowshing" had on board about 1200 Chinese soldiers with arms and ammunition; two Chinese generals, one European officer, Major Von Hanneken, a German officer who had been employed in a military capacity by the Chinese for many years, and twelve field-guns. The destination of the

"Kowshing" was Asan, a place not far from Chemulpo, and on the morning of July 25, 1894, about 9 a. m., when entering the Corean Archipelago, the "Kowshing" sighted several vessels—a small Chinese dispatch vessel and three Japanese vessels, one of the latter the "Naniwa," firing two blank charges across the bow of the "Kowshing," stopped her and ordered her to anchor, which she did in eleven fathoms of water. The "Naniwa" then steamed away and communicated with her consorts. Captain Galworthy of the "Kowshing" signalled for permission to proceed, but was refused by signal. A boat then came from the "Naniwa," boarded the "Kowshing," and examined her papers. The master of the "Kowshing" was asked if he would follow the "Naniwa," to which he replied that he could not do otherwise, but would do so under protest.

The officer left the ship, and being still at anchor shortly afterward the "Kowshing" was ordered by the "Naniwa" to slip or weigh immediately. The Chinese generals, learning the meaning of the signals, objected to their being obeyed. Being told the uselessness of resisting they said they would rather die than obey Japanese orders, and as they had a larger force of men than the Japanese they would fight rather than surrender. Being told that if they did fight the foreign officers would leave the ship, they gave orders to their soldiers to kill the foreigners if they obeyed the Japanese or attempted to leave the ship. A signal was then made to the "Naniwa" to send a boat, and the officer of the boat, who remained at the foot of the ladder, was told of the circumstances, and that the "Kowshing" was a British ship; had left Taku before a declaration of war, and that the Chinese insisted upon returning to Taku. The boat then returned and upon her arrival signal was made for the Europeans to leave the ship at once. Answer was made that the Europeans were not allowed a boat to be sent. Reply was made

by the "Naniwa" that a boat could not be sent. The "Naniwa" hoisted a red flag at the fore and discharged a torpedo, which missed the "Kowshing," and then a broadside followed. The ship was sunk either by this broadside or by a second torpedo or second broadside in about half an hour, and the firing continued upon the Chinese adrift in the water; the Chinese themselves on the "Kowshing" firing both at their own countrymen in the water and at the Europeans. The boats of the Japanese vessel were lowered and rescued what Europeans they could, but fired upon the Chinese in the water, at no time attempting to save them. The firing commenced about 1 p. m. and finished about 2.30 p. m. The lives lost were in number over 1,000, several of whom were Europeans belonging to the ship.

About two hours before the meeting of the "Kowshing" and the Japanese men-of-war an engagement had taken place between these vessels and two Chinese men-of-war, the "Tsi-Yuen" and the "Kuang-Yi," one being crippled and run into shallow water, the other escaped and passed the "Kowshing" with a Japanese flag flying over a white flag. The small Chinese dispatch vessel, "Tsao-Kiang," from Chefoo for Chemulpo, was also captured by the "Akitsushima."

Several questions of international law are involved in this case. The first is as to a violation of international law on the part of the Japanese in commencing hostilities without declaration of war, as they did at 7 a. m. on July 25. As to the firing of the first gun there is some dispute, but I think it reasonable from the circumstances (as they are given by various authorities) to consider that it was done by the Japanese.

Matters had been for some little time strained between the two countries. The occasion of the war was the situation in Korea, a Japanese force was already in Korea, at the capital, and there was a Chinese force in Asan, as well as at the

capital. The Chinese troops leaving Taku in the various transports were sent in two directions—one body of transports to the Yalu River to create an army and to move upon the Korean capital, and the Japanese force from the north and west, and the other body of troops in the “Kowshing” was bound for Asan to reinforce the Chinese force already assembled there. The position of the Japanese in Seoul, the capital, might easily have become critical between these forces, no matter under what pretext the Chinese troops were sent. On July 14 the Japanese Government wrote as follows to the Chinese Government, as represented by the Tsung-li-Yamen or Board of Foreign Affairs: “The only conclusion deducible from the circumstances is that the Chinese Government are disposed to precipitate complications; and in this juncture the Imperial Japanese Government find themselves relieved from all responsibility for any eventuality that may, in future, arise out of the situation.” On July 23 the Chinese transports left Taku, and the same day the Japanese squadron, of which the “Naniwa” was one, left Sasebo, Japan, for Chemulpo. On the morning of July 23 an attack was made upon the Korean palace by the Japanese troops in the capital, which made the Japanese masters of the capital and the government. This was the first blow of the war.

Under the circumstances, with war confidently expected by foreigners between China and Japan, with troops being sent to Korea after an unsettled controversy, it does not seem that Japan acted outside the rules of international law in its commencement of hostilities without declaration on July 23 and 25, and in the capture of the “Kowshing.” The “Kowshing” was chartered to the Chinese Government knowing the probability of hostilities, there was no proviso making the charter void in case of hostilities, and after leaving the Pei-Ho River she was engaged in a mission which at any moment

might be warlike service to a belligerent, unneutral in its character and subject to all the risks of war.

Another question has been advanced, and that is as to the right of the Japanese commander to destroy a neutral vessel without due adjudication and trial by prize courts. It is claimed that he should have captured the "Kowshing" in the usual way and brought it to the nearest Japanese port for trial.

This is to naval officers especially an interesting question. The usual way, of course, is a possible way with reasonable antagonists—a capture with a prize crew and a surrender of the ship, or a close following of the motions and orders of the captors by the captured ship.

The "Kowshing" was under peculiar conditions. The "Naniwa" was, as a ship, mechanically superior to the "Kowshing," but personally and numerically her forces were outnumbered by the armed Chinese on the "Kowshing," who virtually took possession of the ship, rendering her English officers and her regular crew unable to move or manœuvre her. She then became in every way a hostile vessel containing a hostile force. In the possession of a belligerent who would not obey directions and who announced a determination to die rather than to surrender, the "Kowshing" was a fair object for attack, but an attack tempered by the existing circumstances.

So far, then, as the right under international law was concerned, to destroy ultimately a neutral vessel like the "Kowshing," I think there is little doubt. A neutral vessel so closely identified with the enemy and in the enemy's control is to all intents and purposes an enemy's vessel, and should be liable to the same risks. A neutral in the ranks of one belligerent is in war time an enemy to the other.

307. Destruction of enemy prizes.—The destruction of prizes, whether neutral or enemy in character, before legal pro

ceedings and condemnation can be had is to be deprecated. This is universally conceded, but it is also acknowledged that under certain circumstances, such as being unfit to send into port, the merchant vessels of the enemy can be properly destroyed before adjudication. These circumstances have been provided by law and usage with us. The laws of the United States provide in such cases for an appraisement, and if possible for a sale, and disposal of the proceeds subject to the order of the prize court in which proceedings finally take place. This would be the case also if the vessel or property is taken for the use of the United States before coming into the custody of the prize court. If there should be danger of immediate recapture, if the vessel should be unseaworthy, if there should be an infectious disease on board, or if it should be impossible for any other reason to send in a captured vessel of the enemy it is generally conceded that under international law its destruction or abandonment is permissible, all necessary papers being saved and the judicial measures to go on for the satisfaction of all concerned. If damage happens to the vessel or its cargo while in the hands of the captor, and the court holds that the capture has been made with sufficient reason, the responsibility of the captor does not extend beyond a failure to use due care and skill.

308. Destruction of Neutral Prizes.—As to the destruction of neutral prizes much divergence of views has existed. An attempt was made during the Second Hague Conference to settle the matter made acute by the Russian proceedings as to neutral prizes in the Russo-Japanese War. At London, however, perhaps on account of that previous divergence, the subject was approached on both sides with moderation and concession. Considering that the Naval War Code was part of the instructions to the American delegation, the delegation recognized the possibilities under certain circumstances of such destruction, especially as the State Department in the "Knight Commander" case had expressed

itself as not being prepared to say that under certain circumstances neutral prizes could not be destroyed.

The American delegation took the ground, however, that only under circumstances of great military necessity or in cases of self-preservation should such action be taken. This stand was also taken by them because rigid rules forbidding such destruction might prove impracticable and be violated by urgent necessity. The compromise was then arranged in committee by which only vessels that came within the limits of confiscation could be so destroyed.

The general principle as given in Article 48 was, that a neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

The first condition necessary to justify the destruction of the captured vessel is that she should be liable to condemnation upon the facts of the case. The captor must have reason to expect the condemnation of the vessel in order to have any claim to destroy her.

The second condition is that if the observance of the general principle should involve danger to the safety of the vessel or vessels of war, or to the success of the operations in which she is engaged at the time. The situation at the moment when the destruction takes place is the one which must be considered in order to decide whether the conditions are or are not fulfilled.

The necessary precautions for persons and papers on board of the ship must be taken, and the exceptional necessity of the destruction must be established before any decision of the prize court can be made, and compensation is also provided for in case the capture is invalid, even if the destruction should have been held to be justifiable. If neutral goods not liable to

compensation have been destroyed with the vessel the owner of such goods is entitled to compensation.

In Article 54 the doctrine is established that if a vessel should have less than half the cargo contraband under the circumstances just stated, involving danger to the safety of the ship or to the operations immediately engaged in, the captor could destroy the contraband while releasing the vessel. This is a logical sequence from Article 48. Of course, when the goods of a contraband nature have been handed over or destroyed, and all of the formalities necessary to establish the facts of the case have been carried out, the vessel must be left free to continue her voyage.

309. Transfer of flag.—The almost general adoption of the article of the Declaration of Paris which provides that the neutral flag shall cover goods belonging to the subjects of a belligerent unless it is contraband of war, increases the value of the neutral vessel for purposes of trade during war times. A transfer to a neutral flag not only saves the vessel from capture but also the goods carried. There have been varying practices or rules in regard to the transfer of a vessel from a belligerent to a neutral flag in time of war or on the eve of its outbreak. By the compromise effected in the London Naval Conference this variance has been greatly reduced, and the rules given there greatly simplifies the matter. The matter has been divided into two phases, a transfer before the outbreak of war and a transfer subsequent to the commencement of hostilities.

310. Transfer before the outbreak of hostilities.—The transfer of an enemy vessel to a neutral flag before the outbreak of hostilities is valid unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. If, however, a bill of sale is not found on board a vessel which has lost her belligerent nation-

ality less than sixty days before the outbreak of hostilities there is a presumption that the transfer is void:

When the transfer was effected more than thirty days before the outbreak of hostilities, if it should be complete, there is an absolute presumption that it is valid, especially if it is made in conformity with the laws of the countries concerned, and if its effect should be such that neither the control of or the profits arising from the employment of the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.²

311. Transfer of flag after the outbreak of hostilities.—The transfer of flag after the outbreak of hostilities is void, unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

Article 56 of the declaration goes on to say that "there is, however, an absolute presumption that a transfer is void."

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel is reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.

No particular provision could be agreed upon in the case of vessels transferred to a neutral flag but remaining in the same trade and on the same route as before. It is fair to say, however, that such vessels would have a presumption against the legality of their transfer.

312. Enemy character.—Upon the question of the status or character of a merchant vessel in war time it may be regarded as settled that the flag carried is the test of its character. Upon the subject of the goods carried no agreement was reached, as the question of the domicile or nationality of the owner became involved, and our government was not prepared to give up domicile as a test of ownership, hence no agreement was reached and the question still remains open.

313. Exemption of convoy from search.—Upon the question of exemption of neutral vessels from search while under neutral convoy the doctrine of exemption so long upheld by the United States was agreed to, and the responsibility for the convoyed vessels rests with the commander of the convoying vessel of war.

314. Resistance to search.—In Article 63 of the Declaration of London it is held that "forcible resistance to the legitimate exercise of the right of stoppage, search and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods."*

* Appendix, p. 305.

SUPPLEMENTARY CHAPTER.

SOME CHANGES SINCE 1910.—SOVEREIGNTY OVER AIR.—
ARMED MERCHANTMEN.—ENFORCEMENT OF NEUTRALITY
LAWS.—INTERNMENT OF VESSELS.—TRANSFER OF FLAG.
—ORDERS IN COUNCIL.—CONSULAR COURTS.

The period, extending from the publication of this volume until the time of the present writing, covers a term of more than six years. This period, even in peace time, would naturally include changes in various usages and practices in international law, but it has included also, and still includes, the most extensive war in the history of the world, carried on by weapons and forces unknown or untried in the past. Hence, there have arisen new questions, which cannot be finally settled until a very considerable time after the close of the war. Passions, prejudices, national pride, and many other reasons will prevent for a long period a calm and deliberate settlement, or even discussion, of the questions arising from and coincident with the war.

A change of emphasis and of status, however, has been caused as to existing rules and usages in many cases, and as to proposed rules and declarations. Hence, while the time is not ripe for a thorough writing or revision of this book, it has been deemed wise, before the second impression is made, to correct some pages in the main portion of the book and to add a supplementary chapter, and also to give additional appendices as well as an index to the volume as a whole.

So far as naval officers are concerned, and it is for officers of the United States Navy that this manual has been mainly written, it may be said that since the original publication of this book a new edition of the United States Navy Regulations and Naval Instructions has been published in 1913. This contains, very much in the same words as in previous editions,

instructions as to the conduct of officers in their relations with other countries and with respect to the tenets of the law of nations in times of war and peace. In addition to these instructions and the rules of international law, officers of the Navy are governed by the Treaties of the United States in force with other countries. A copy of these treaties is or should be found in the official library of every ship of size in commission in the Navy. These treaties are not uniform in their nature, and the treaty or treaties in force with each country should be consulted when investigating matters pertinent to separate countries.

In addition to these sources of information, there are proclamations, state papers, and diplomatic notes that are published from time to time giving the attitude of this country with respect to the various questions concerned. These are upon sufficient occasion re-issued for the information of the naval service. They are generally published in full by the principal journals of the day, and will be found in full in the various publications and supplements of the *American Journal of International Law*; the latest publication as to date of these various papers is, of course, the one having mandatory power upon the matter treated, so far as officials of the government are concerned.

315. The Hague conventions in the present war.—Included among the treaties still in force with the United States are the various Hague conventions that were agreed to by the United States, and confirmed without reserve by the United States Senate. These conventions are still in force, or still as binding as any treaty can be, among the signatories of the conventions. They can be construed technically as not binding, if opposing belligerents include non-signatories of the convention. Morally, it is generally considered, their force is still the same, and it is rarely that advantage is taken of the

fact that Montenegro, Turkey, or some small nationality represented at the Hague did not agree or appear as a signatory to a convention otherwise signed and ratified.

316. Status of the Declaration of London.—The Declaration of London is under the same conditions as any treaty; to be valid and binding it must not only be agreed upon and signed by the delegates present, but must have gone through the usual forms of ratification by the powers represented at the London Naval Conference. The United States is the only nation represented at this Conference which has made the complete ratification of this Declaration, which includes, of course, the favorable action of the United States Senate. As no other country has finally ratified this instrument, or agreed singly to ratify it to the full extent, we are in the position of having ratified a unilateral agreement and made a party to a treaty without other legal and final participants. As a result of this condition, the State Department has declared that it is not binding as a treaty. It is, however, of value and quoted as a codified declaration of international law, agreed upon as such by delegates of the principal maritime countries after exhaustive discussion. As the instrument stands or falls as a whole, common agreement upon any article or portion of the Declaration does not give any binding effect to such article unless the Declaration is ratified as a whole.

317. Aerial jurisdiction.—One matter is practically settled by common usage in this war, and that is that the sovereignty and jurisdiction over the air belongs to the country over which it is superimposed. It may be considered settled that in war time this jurisdiction will be rigidly claimed and guarded by neutrals against belligerent aerial craft. It may also be assumed that in the time of peace the right or usage of innocent passage by any aerial craft is conceded to them. Wireless messages over neutral territory have not as yet been inter-

ferred with. As to the area of permissible war operations in the air, this would not unnaturally extend to the superincumbent air of the high seas and of all belligerent territories.

318. Submarine cables.—As to submarine cables, the use of which is treated in this volume on page 176, it may be said that there has been no common agreement as to submarine cables in time of war as therein proposed. As a matter of fact, submarine cables between the territory of the enemy and that of a neutral have been cut on the high seas by the British in the case of the German cable near the Azores, and by the Germans in the case of the British cable near the Fanning Islands in the Pacific. Such control on the high seas over belligerent cables goes with the command of the sea, and has led to the cable isolation of the Central Powers in the present war. As to neutral censorship, Secretary Bryan stated that "since a cable is subject to hostile attack, the responsibility falls upon the belligerent and not upon the neutrals to prevent cable communications," while "as a wireless message can be received by all stations and vessels within a given radius, every message in cipher, whatever its intended destination, must be censored; otherwise military information may be sent to warships off the coast of a neutral. It is manifest that a submarine cable is incapable of becoming a means of direct communication with a warship on the high seas. Hence its use cannot, as a rule, make neutral territory a base for the direction of naval operations."¹

319. Restrictions as to the use of certain ports.—In regard to the restrictions placed upon vessels of war by various nations, it may be said that this information is conveyed, as a rule, to the naval service of the United States by means of a general circular giving the necessary information as to the number of vessels, length of stay, or as to closure of certain ports in war

¹ Senate Executive Documents, 63d Congress, 3d Session, No. 716.

or peace, or both war and peace. Vladivostok, Spezzia, New Harbor of Singapore, are examples of such ports. As to our own ports, Articles 1503 and 4091, of the Navy Regulations of 1913, give the names and rules as to American ports closed to vessels of war and merchant ships of foreign countries. At the time of present writing, these ports are: The Dry Tortugas in the Gulf of Mexico; Great Harbor, Culebra; Guantanamo Naval Station, Cuba; Pearl Harbor, Hawaiian Islands; Guam; Subig Bay, Philippine Islands, and Kiska, in the Aleutian Islands.

320. Capture of enemy merchantmen.—So far as the United States are concerned, in view of the fact that there is no general treaty to the contrary, the capture of merchantmen of the enemy is legal, except where there is a special treaty to the contrary. The treaty between the United States and Italy of February 26, 1871, exempts, in case of war between the two nations, the private property of their respective citizens and subjects from capture or seizure upon the high seas, except in the case of carriage of contraband or of a violation of a blockade. In 1866 the war between Austria and Italy was carried on to the end without any capture of private property at sea. So far as the present war is concerned, no such exemption has been agreed to or carried out between these two countries. Small vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture. This exemption does not apply to vessels engaged in deep sea fisheries, or to vessels who cure fish, and thus prolong their voyages. This exemption ceases as soon as these vessels take any part whatsoever, directly or indirectly, in hostilities. Hospital ships are allowed exemption from capture or destruction by the Geneva Convention, to which the United States is a signatory; if, however, these ships are used for military purposes in any way, their exemption ceases. Military use would

include duties as a transport, as a scout, or as a bearer of communications.

321. Safe conducts.—If a vessel of an enemy is given a safe conduct by proper superior authority of the opposing belligerent, it is free from capture. Safe conducts were issued during the Spanish-American War to the Spanish merchant vessels engaged in transporting Spanish prisoners on parole from Santiago de Cuba to Spain. These safe conducts were issued by the United States Consuls under instruction from the Department of State. If a vessel should be relieved from capture on the acceptance of ransom or ransom papers, she would be exempt from a second capture by other vessels of war.

322. Other exemptions of enemy vessels.—Vessels engaged in philanthropic or charitable voyages, or that are engaged in exploring or scientific expeditions alone, are, as a rule, exempt from capture. A missionary ship owned by a Swiss society, but using the French flag and registry, has been exempted from capture. Vessels covered by the term of days of grace, duly announced by the belligerents concerned, are also exempted from capture during the time allowed.

323. Neutrality laws.—The observance of the laws of neutrality seems to be within the jurisdiction both of the Department of Justice and the collectors of ports in the various harbors, etc., of the United States. The control of vessels of war and of merchant ships in port, so far as their mooring and anchorages are concerned, and also as to the police regulations of ports, is naturally in the hands of the local harbor-master. So far as the questions of assistance to the collectors of port, to the United States marshals and as to the various other matters concerning the observance, etc., of neutrality is concerned, it may be stated that the forces of the Army and Navy can be called upon by order of the President, who is not only the Commander-in-Chief of both services, but is especially authorized to use such forces in various cases.

The neutrality laws of the United States are in an unsatisfactory condition, and the laws need revision. At present this is a matter under discussion by Congress. Conflicts between authorities have arisen, and in some cases the laws are not penal in character. Fenwick says, p. 150, that "It will be observed, therefore, that in certain cases involving the public vessels of a belligerent, a twofold action on the part of the government is required to maintain the neutrality of the United States. On the one hand, the judicial department of the government is required to prosecute individuals who assist in augmenting the force of such vessels (Sec. 5285), and on the other hand, the executive department of the government is called upon to take action against the vessels themselves to prevent them from violating the law." Of course, this is municipal rather than international law, but grave matters of international law and diplomacy arise from unsatisfactory conditions of municipal law, especially neutrality laws, as the "Alabama" controversy has borne evidence. The control of radio installations by us by executive order has already been referred to on preceding pages.

324. Treatment of auxiliary vessels by neutrals; internment.—

In regard to the treatment of a tender or an auxiliary vessel of war, the policy of the United States has been defined in the case of the "Locksun," a German collier, attending as such upon the German cruiser "Geier." From the facts of the case, our State Department "is of the opinion that the operations of the 'Locksun' constitute her a tender to the 'Geier,' and that she may be reasonably so considered at the present time. This government is, therefore, under the necessity of according the 'Locksun' the same treatment as the 'Geier,' and has taken steps to have the vessel interned at Honolulu if she does not leave immediately." * * * "The captain of the 'Locksun'

stated upon his arrival that he had on board 245 or 250 tons, whereas investigation showed that he had on board approximately 1600 tons."²

In a later communication upon this case from Secretary Bryan to Ambassador Bernstorff, December 11, 1914,³ he declares "that the entire practice of internment of vessels appears to be of recent origin. The doctrine of internment was apparently first applied to any great extent during the Russo-Japanese War, and it is believed that the treatment of the 'Locksun' is in keeping with the high standards of neutrality upon which the doctrine of internment is based. The department is not aware that measures to preserve neutrality are entirely dictated by precedent and international law, and it believes that belligerents hardly have proper cause to question an attitude on neutrality justly in advance of precedent and international law, if it is applied by the neutral impartially to all belligerents. As to the advisability of assuming such an attitude, the department is impressed with the proposition that the neutral and not the belligerent is the proper judge in the circumstances."

The mode of internment is a matter for the executive, i. e., the President of the United States, to decide. The initial action is generally taken by the collector of customs of the port, aided by such military or naval assistance which the executive considers necessary. The United States District Court can take action as to libelling an interned vessel through its officials, as shown in the case of the "Appam." Generally, when a vessel is to be interned, it is handed over to naval jurisdiction and custody, the responsibility for the care of the ship and its personnel being with the senior naval officer present.

² Counsellor Lansing to Ambassador Bernstorff, Nov. 7, 1914.

³ A. J. I. L., Supplement, July, 1915, pp. 245-252.

An interesting matter occurred in regard to six interned officers of the German cruiser "Kronprinz Wilhelm," interned at Norfolk, Va., who received, on October 10, 1915, permission to go ashore and return by 8 a. m., October 11, 1915. They failed to do so, and it was thought that they had broken parole and fled in the yacht "Eclipse," purchased by one of the officers shortly before their departure. The circumstances of the case and of other breaches of parole were brought to the attention of the German Government in a note of November 16, 1915. The actions of the German officers were characterized "as breaches of the honorable conduct to be expected of officers and men of visiting and interned ships of war of a belligerent nation." In consequence the American Government declared that it was forced to restrict the very liberal privileges the interned German officers had hitherto enjoyed. Secretary Lansing "recalled that during the Russo-Japanese War, when the Russian ship 'Lena' was interned by United States authorities on the Pacific coast, three officers of that ship escaped and returned to Russia; and that upon the Government of the United States calling the matter to the attention of the Russian Government, it immediately caused the escaped officers to return to American jurisdiction, where they were interned for the remainder of the war."

This precedent the American Government regarded "as in accord with the best practice of nations and applicable to the cases" referred to in the note. The note closed by asking for the return to the United States of the escaped officers. Especial mention was made of one Otto Brauer, executive officer of the "Prinz Eitel Friedrich," who had fled from that cruiser and, according to "reliable information," returned to Germany and was then "on duty on board the cruiser 'Lutzow' at Danzig."

A few days later, when the naval authorities, by way of precaution against further evasions, prepared to photograph the interned German officers, their Ambassador, Count von Bernstorff, in a note of November 22, 1915, wrote: "I realize that the deplorable escapes of the past, although inspired by patriotic motives, justify strict methods of surveillance, but believing that effective measures already have been taken to insure no further escapes, I would appreciate it greatly if these officers and crews could be spared the humiliation of having their photographs taken."

Secretary Lansing, on the following day, granted the request, "although," he added, "I consider that the redoubling of the vigilance of our naval authorities is even more humiliation to the interned than to be photographed."

The notes subsequently exchanged indicate how differently the two governments understood the obligation of officers of belligerent vessels voluntarily seeking internment in a neutral port:

FOREIGN OFFICE,

BERLIN, February 16, 1916.

The undersigned has the honor to inform His Excellency, the American Ambassador, Mr. James W. Gerard, in answer to the communication of December 24, 1915, regarding the escape of officers and men from the German auxiliary cruisers "Kronprinz Wilhelm" and "Prinz Eitel Friedrich," at present interned in American ports, that the matter has been brought to the attention of the German Naval Administration. According to the investigations made by the latter, the commanders of the two auxiliary cruisers, unfortunately, did not sufficiently instruct their officers and crews regarding the significance of the "assurance" ("Versicherung") given by them. Moreover, the expression "pledge" chosen by Rear Admiral Beatty in his letter to the commanders does not conform absolutely to the idea of the "word of honor" ("Ehrenwort"). The persons who escaped, therefore, were obviously convinced that they would not, through their act, render themselves guilty of a breach of their word of honor.

DEPARTMENT OF STATE,

WASHINGTON, March 9, 1916.

Mr. Gerard is informed that the reply of the German Foreign Office regarding the escape of officers and men of the German cruisers at present interned in ports of the United States was referred to the Navy Department. In reply the position is taken by the Navy Department that the "Kronprinz Wilhelm" and the "Prinz Eitel Friedrich" sought refuge in an American port and agreed to be interned. Therefore, the obligation of remaining with their vessels rested wholly with the officers of those vessels.

That these officers are not cognizant of the principles of international law cannot be assumed. Promises were given in writing by the captains of the two vessels for themselves, the officers, and the crews of the vessels that they would in no way violate American neutrality during their internment. It seems to be indicated by the answer of the German Naval Administration that it does not appreciate fully the seriousness of the obligation assumed thus by their naval representatives on the two vessels in question to remain within the assigned limits with the minimum of trouble to the government of the country in which they are interned. They were considered as guests of the American Government and not as prisoners of war, and as such guests permission was given them to leave the navy yard and to visit on leave any part of the United States. Lieutenant Zur see Koch and Doctor Kruger Kroneck, after having availed themselves of the permission mentioned to leave the limits of their internment, failed to return as they were unquestionably bound to do. Furthermore, money was supplied by Doctor Kroneck with which the yacht "Eclipse" was purchased by six officers of the "Kronprinz Wilhelm" who escaped from the jurisdiction of the Government of the United States. Should the return of Doctor Kroneck be effected the Government of the United States should not consent to his release under the application to naval officers of the Geneva Convention rules as on account of considerable sickness on the interned ships his presence on board is necessary. No mention is made in the reply of the German Foreign Office of Otto Brauer, the executive officer of the ship "Prinz Eitel Friedrich," who left that ship after the captain of the vessel had been requested by the Government of the United States not to give permission to his officers

or men to go on shore which request was acknowledged by the captain who stated that he would act in accordance therewith. It cannot be conceived by the Navy Department that the executive officer, the next in command, was ignorant of this request of the Government of the United States. The departure of Otto Brauer, the executive officer, was taken against this government's express direction, and the Navy Department is of the opinion that he should be returned to the jurisdiction of the Government of the United States. Also in the case of the engineer officer, Herman Dieke, of the "Locksun," interned at Honolulu, who, while on parole, absented himself, no reply is made. The full reply of the Navy Department is being sent by mail to Mr. Gerard, who is directed to present the views of the Government of the United States, and to say that the department would be glad to have an early reply.

325. Armed merchantmen.—A question arose during the present war as to the treatment of armed merchantmen in American ports. It was claimed that their treatment should be as vessels of war—auxiliary cruisers. This government has finally decided that if their armament is for defensive purposes only, and so located and limited, they should be treated as merchantmen while in our ports.* In this case their use of their armament is incidental only to their purposes of trade as merchantmen, and they are not expected or allowed to go out of their general course to attack any armed or unarmed vessel of the enemy.

In case of an engagement arising between an armed merchantman and a vessel of war of an enemy, naturally the armed merchantman will be treated as a vessel resisting search, and can be captured or sunk according to the circumstances without necessitating the visit and search accorded to unarmed merchantmen. Upon surrender, her officers and crew are liable to be held as prisoners of war, but not as non-combatants carrying on illegal warfare. An attack upon an enemy mer-

*Stowell and Munro's Cases, War and Neutrality, p. 315.

chant vessel would place an armed merchantman under the category just referred to, unless she had a commission as a privateer.

326. Transfer of flag.—In regard to the transfer of a belligerent vessel to a neutral flag, it may be well to consider the statement in the report made by the American delegation to the London Naval Conference, which reads as follows:

“It has been decided that commerce in ships in time of war is, in general, not legitimate *unless it is bona fide commerce*, and not undertaken to evade the consequences to which the ship would be liable if it retained the enemy flag. The burden of proof of validity of the transfer is placed on the vender. In all such cases commerce would be regarded as illegitimate when the transfer is made (1) in transitu or in a blockaded port, (2) with the right of re-purchase or return, or (3) contrary to the laws of the flag which it bears.

“It would also be possible, and to some extent has been the practice, for ship owners anticipating war to make transfers just before the outbreak of war. Such transfers, when made with the view of evading the consequences of the war and not as commercial transactions, are not regarded as legitimate, but the burden of proof rests upon the captor, except when the papers in regard to the transfer, which has been made within sixty days before the outbreak of the war, are not on board. In this exceptional case the burden of proof of the validity of the transfer is placed on the vessel, as there is not sufficient evidence at hand in the ship's papers to enable the captor to release the ship.

“It would, however, be an undue interference with commerce if all sales or sales made a long time before the war were liable to be regarded as invalid. It is, therefore, decided that sales made more than thirty days before the war, even though made with the idea of evading the consequences of a war which

might subsequently break out, would be valid, unless there is some irregularity in the transfer itself, or unless it is not an actual transfer, evidence of which might be in the fact that the profits and control remain in the same hands as before the sale.

"There are thus established three periods under which transfer of flag is considered, (1) during war, when burden of proof of the validity of the transfer rests upon the vender; (2) a period of thirty days before the war, during which it is necessary for the captor to prove that the transfer is made to evade the consequences of war; and (3) the period prior to thirty days, when, regardless of whether or not the transfer is made to escape the consequences of war, it is necessary for the captor to establish that the transfer itself is irregular, or not in fact a transfer. It is also necessary that, in order to have advantages of these provisions, a vessel transferred within sixty days before the war shall have the papers relating to the sale on board.

"These provisions establish much more definite rules, where formerly there had been great diversity of practice among states or even diversity in the same state at different periods. Commerce in ships is recognized as legitimate under such restrictions as seem necessary, in order to safeguard belligerent rights."

During the present war, several cases have occurred under this head. Probably the most interesting is that of the ship "Dacia," formerly of the Hamburg-American line. The decision in this case by the French tribunal was as follows:

"Whereas, preliminary to the adoption of Article 56 of the Declaration of London, certain proposals had been made with a view to subordinating the validity of transfers of flag, as far as belligerents were concerned, to the sole consideration of good faith, whereupon a difference of opinion had been

manifested with respect to the meaning of the expression 'good faith' proposed as the criterion of validity ;

"Whereas, the delegation of the United States apparently held that good faith was present if the agreement to transfer was genuine and complete and free from any fiction or irregularity, while the German and British proposals implied by 'good faith' the absence, among the motives for the transfer, of intention to withdraw the ship from the effect of the right of capture ;

"Whereas, on this point, according to these propositions, as well as according to the original text proposed for adoption by the Naval Conference at London under No. 35 of the bases of discussion, the transfer could be considered valid only when there was reason to believe that it would also have taken place if war had not occurred (Blue Book, pp. 183 and 260) ;

"Whereas, it is in this latter sense that the framers of the Declaration of London have expressed themselves when adopting the text of the aforesaid basis of discussion, while at the same time referring to the possibility of proof to the contrary, except in certain cases when there was an absence of interest in the actual transactions ;

"Whereas, the report, presented to the conference in support of the rules adopted, especially Article 56, expressly states that a transfer, to be valid against a belligerent, must be one not due to the fact of war (Blue Book, pp. 326 and 212) ; for example, a transfer through inheritance ;

"Whereas, this view has been adopted by the German legislation (Prize Ordinance of September 30, 1909, chap. ii, art. 12) according to which the transfer is valid only if the captor is convinced that 'the transfer would have equally taken place if war had not broken out—for instance, as a result of inheritance or a contract for construction' ; by the Austrian legislation (Service Regulations for Naval Warfare, May 2, 1913

3, art. iii) which reproduces purely and simply the text of Article 56 of the Declaration of London; by the Russian legislation (Prize Regulations of March 27, 1895, art. 7) according to which it must be proved that the transfer did not have for its object the protection of enemy property; by the British legislation which has applied the Declaration of London to the conduct of the war in the same terms as the aforesaid French decree of November 6, 1914 (Order in Council of October 29, 1914); and by the Italian jurisprudence and legislation (Decree of June 3, 1915);

“Whereas, also, in the language of the Italian Prize Commission in 1912 (Case of the “Aghios Georghios,” Proceedings of the Royal Prize Commission, Italo-Turkish War, vol. i, p. 197), ‘if capture is the penalty by means of which the belligerent forbids to enemy merchant vessels the use of the sea, it follows that any transaction whatever, even though proceeding from legitimate interest, can be considered by the belligerent only as in fraud of his rights and consequently void, if its immediate tendency is to withdraw the ship from this penalty * * *’;

“Whereas, in this case, apart from the singular character of the bill of sale which was found on board and which was alleged to have been executed on December 17 or 19, 1914, by the Hamburg-American Line and Breitung, who had not signed it himself nor had anyone on his behalf, with whom the director of the aforesaid company confesses never to have had dealing and whom he declares he never met—even admitting the regularity of the purchase of the “Dacia” by Breitung, and even supposing the sincerity of the transfer of the ship by the company to Egon von Novelly, and by the latter to Breitung—it is shown, as was brought out in other analogous cases (The ‘Jemmy,’ 4 Rob. 31; 1 English Prize Cases, 331; The ‘Benito Estenger,’ U. S. Rep. 176, p. 568; Story,

Notes on the Principles and Practice of Prize Courts, p. 63) that not only had the ship, after transfer, 'continued its former trade with the enemy,' but at the moment of capture was engaged in the very voyage for which it had been chartered when it was under the German flag and for which it had been transferred to the neutral flag;

"Whereas, an apparent transfer to a neutral flag for the purpose of permitting trade with the enemy and withdrawing the ship from capture cannot be valid as against belligerents;

"Whereas, the court has jurisdiction over the validity of the capture of the ship only, and consequently does not pass judgment upon the cargo;

"It is decided: That the capture of the steamship 'Dacia' made by the auxiliary cruiser 'Europe,' on February 27, 1915, is adjudged good and valid prize, together with its tackle, furniture, equipment, and supplies of all kinds, to be distributed among those entitled to it in conformity with the laws and regulations in force;

"The articles and effects, being the personal property of the captain and the crew, are not contraband, and will be restored to those entitled to them."*

327. The so-called blockade of Germany in the present war.—

Under the circumstances existing on the seacoast of Germany, and of the close proximity to Germany of Holland, Denmark and Sweden, neutral countries of the North Sea and Baltic, it is impracticable by a legal maritime blockade to cut off Germany from the outer world. As a consequence the Allies have made use of their effective control of the sea to stop trade to and from Germany through neutral ports and countries. This action is based upon the doctrines of contraband and of continuous voyages, supplemented by claims of justifiable retaliation for methods on the part of Germany

* International Cases. Stowell and Munro, War and Neutrality, p. 364-372.

during the war, and especially in the North Sea, by the laying of mines aimed against peaceful traders and non-combatant crews, with the avowed object of preventing commodities of all kinds, including food for the civil population, from reaching or leaving either Great Britain or the coasts of France.

"The British and French Governments will," so the British Ambassador notified the American Government, " * * * hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes, unless they would otherwise be liable to condemnation. The treatment of vessels and cargoes which have sailed before this date will not be affected." (Extract from note of British Ambassador to the Secretary of State, March 1, 1915, relative to the German War Zone decree.) The action so taken is studied and discussed under the Doctrine of Ultimate Consumption (*supra*, p. 418), and the British Interdict (*post*, p. 596).^{*}

In view of the difficulties of a blockade, Great Britain not only widened the list of contraband, in which she was partly justified by the great addition caused by the introduction in modern war of warlike elements formerly unused, but advantage was also taken of a decree made by Germany, assuming the control of all food supplies within her borders. This decree was not unnaturally considered to abolish all distinction between supplies for civilians and those for military and naval forces. In addition, Great Britain adopted the doctrine of ultimate consumption, "that is to say, the doctrine in accordance with which Great Britain reserved the right, whenever the imports to a neutral country were found to exceed the amount reasonably required for the needs of the neutral country itself, to assume or presume that any excess over this amount would reach Germany."¹

^{*} International Cases. Stowell and Munro, War and Neutrality, p. 437.

¹ International Cases. Stowell and Munro, War and Neutrality,

128. Orders in council.—In Great Britain, what is known as an order in council is an order issued by the sovereign on the advice of the privy council, or more usually on the advice of a few selected members thereof, who are experts or specially concerned in the decree, which when agreed upon and published, has executive force as a legal act. It is founded upon the prerogative of the sovereign. At the present time, as a matter of principle, it is generally understood and accepted in Great Britain that orders in council may be issued on the strength of the royal prerogative, but they must not seriously alter the law of the land or the statutes of parliament. By the decision in the "Zamora" case, this is extended to absolutely known and recognized rules of international law.

The most celebrated instance of the use of the orders in council before the present war was in 1807, when Great Britain was at war with France. In answer to Napoleon's Berlin decree, the object of which was to destroy the British shipping industry, George III and his ministers issued orders in council forbidding all vessels, under penalty of seizure, to trade with ports under the influence of France.

In times of emergency, it is considered by British legal authorities, that the use of orders in council is indispensable to the executive. In September, 1766, a famine being feared, the export of wheat was forbidden by an order in council, and the Regulation of the Forces Act, 1871, empowers the government in a time of emergency to take possession of the railway system of the country by the issue of such an order. The President of the United States can be empowered to take similar action only by Act of Congress.

Most of the drastic regulations as to contraband, trade with the enemy and the restriction of neutral carriers and communication, are issued as orders in council necessitated by the emergency of the war, both as to internal matters and external warfare.

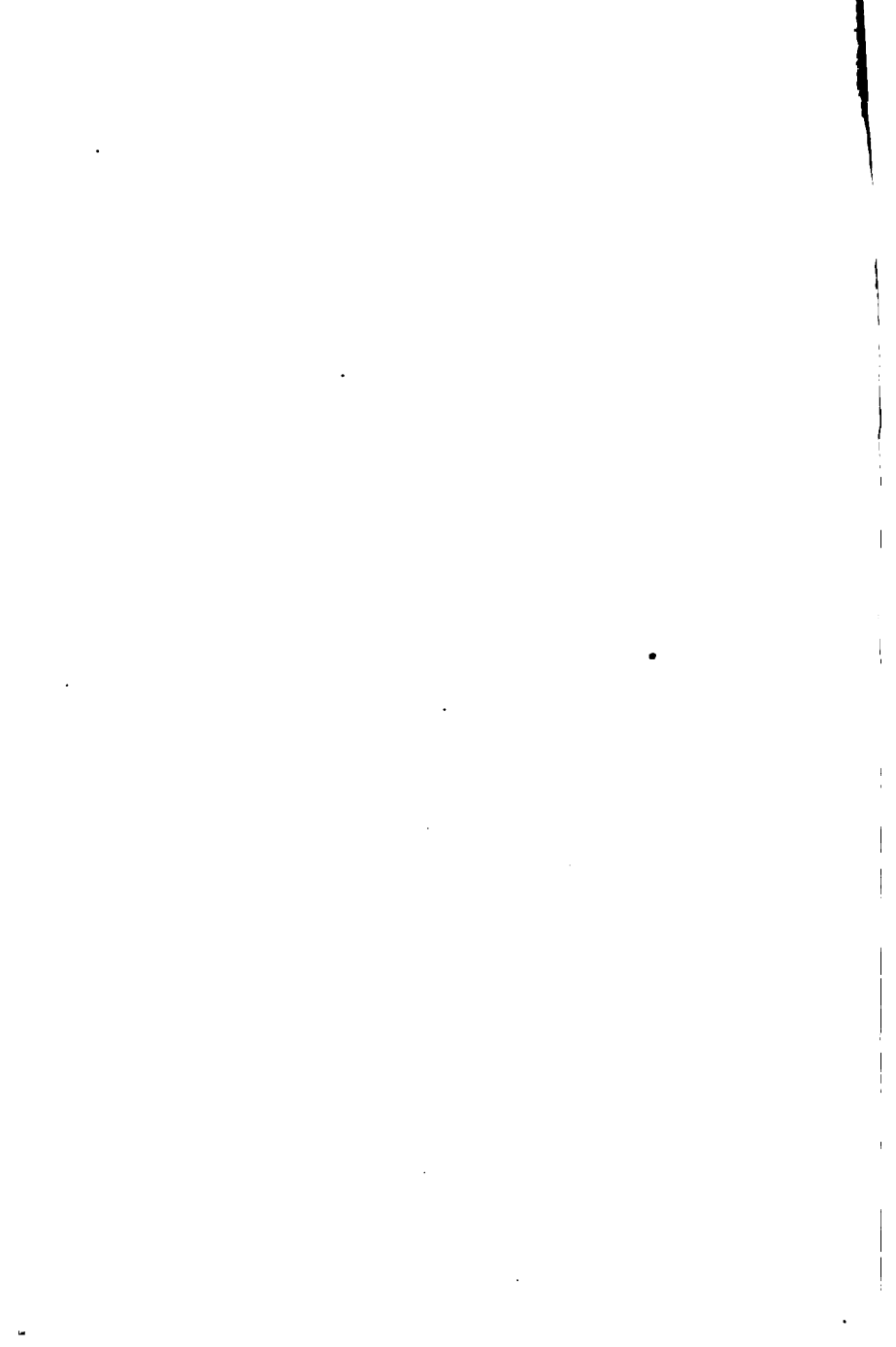
329. Consular and mixed courts.—The criminal jurisdiction of consular officers of the United States is generally limited to their own citizens; natives guilty of crimes or injuries against foreigners must usually be prosecuted in the local courts of their country. "The extent of the exemption from local law," says Borchard, "depends almost entirely upon treaty, and may differ from country to country and with respect to the nationals of different states. The system of protectorates with its incidental wide foreign jurisdiction and the system of mixed courts, as in Morocco, Tunis, Tripoli, Shanghai, and other places, is a phase of extra-territorial jurisdiction."

The Supreme Court of the United States has held that the national government has power to make treaties providing for the exercise of judicial authority in other countries, by its officers appointed to reside therein, and that the provisions of Title XLVII of the Revised Statutes, for the trial of felonies without indictment by a grand jury and trial by a petit jury, are constitutional—140 U. S. 453.

In 1876, as a result of negotiations between the Ottoman and Egyptian governments and the various Christian powers having representatives at Cairo, certain courts were created in Egypt for the trial of mixed civil cases arising between persons of different nationalities, and also suits of foreigners against natives, the Egyptian Government and members of the Khedival family. These mixed tribunals supersede to an extent the consular courts and consist of five judges, three of whom are foreigners and two natives. The foreign judges are appointed by the Khedive on the recommendation of the great powers, each of which is represented by from one to three judges. There are several tribunals of original jurisdiction (first instance), and a court of appeals at Alexandria. The United States is represented in the court of appeals at Alexandria, court of first instance at Cairo, and the court of first instance at Alexandria.*

* Moore's Digest, Vol. II, p. 723.

APPENDICES.



APPENDIX I.

THE DECLARATION OF PARIS, 1856.

DECLARATION RESPECTING MARITIME LAW SIGNED BY THE PLENIPOTENTIARIES OF GREAT BRITAIN, AUSTRIA, FRANCE, PRUSSIA, RUSSIA, SARDINIA, AND TURKEY, ASSEMBLED IN CONGRESS AT PARIS, APRIL 16, 1856.

The plenipotentiaries who signed the Treaty of Paris of March 30th, 1856, assembled in conference, considering:

That maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law, and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their governments are animated than by seeking to introduce into international relations fixed principles in this respect;

The above-mentioned plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

1. Privateering is, and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the states

which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success.

The present declaration is not and shall not be binding, except between those powers who have acceded or shall accede to it.

APPENDIX II.

REGULATIONS CONCERNING THE LAWS AND CUSTOMS OF LAND WARFARE.

SECTION I.—BELLIGERENTS.

CHAPTER I.—*The Character of Belligerents.*

ARTICLE 1.

The laws, the rights, and the duties of war apply not only to the army, but also to militia and volunteer organizations combining the following conditions:

1. Having at their head a person who is responsible for his subordinates.
2. Having a permanent distinctive sign recognizable at a distance.
3. Openly bearing arms.
4. Conforming to the laws and customs of war in their operations.

In countries where the militia or volunteer organizations constitute or form part of the army, they are comprised under the denomination of army.

ARTICLE 2.

The inhabitants of an unoccupied territory who, on the approach of an enemy, spontaneously take up arms in order to repel the invading troops, without having had time to organize in accordance with Article 1, shall be considered as a belligerent if they bear arms openly and respect the laws and customs of warfare.

ARTICLE 3.

The armed forces of the belligerent parties may be composed of combatants and non-combatants. In case of capture by the enemy, both shall be entitled to treatment as prisoners of war.

CHAPTER II.—*Prisoners of War.*

ARTICLE 4.

Prisoners of war are in the power of the hostile government, but not in that of individuals or detachments which have captured them.

They must be treated humanely.

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE 5.

Prisoners of war may be subjected to internment in a city, fortress, camp, or any place, and may be required not to go beyond certain fixed limits. However, they shall not be confined except as an absolutely necessary measure of safety, and then only during the continuance of the circumstances which necessitate this measure.

ARTICLE 6.

A government may employ prisoners of war as laborers, according to their grade or aptitude, except officers. The labor shall not be excessively hard, and shall have no connection with the war operations.

Prisoners of war may be permitted to work for the benefit of public departments or private parties, or for their own benefit.

Labor performed for the government shall be paid for according to the schedules in force for soldiers of the national army performing the same labor, or, if there is no such schedule, then at rates commensurate with the work performed.

When the work is done for the benefit of other public departments or of private parties, the conditions thereof shall be regulated with the consent of the military authorities.

The wages earned by the prisoners shall be utilized to mitigate their situation, the surplus being credited to them upon their discharge, after deducting the cost of maintenance.

ARTICLE 7.

The government into whose power the prisoners of war have fallen shall be responsible for their maintenance.

In the absence of a special agreement between the belligerents, the prisoners of war shall be treated on the same footing, with regard to food, bed, and clothing, as the troops of the government which has captured them.

ARTICLE 8.

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the nation into whose power they have fallen. Any act of insubordination on their part shall warrant the application of the necessary restrictive measures.

Escaped prisoners who are recaptured before rejoining their army or before leaving the territory occupied by the army which has captured them, shall be amenable to disciplinary punishment.

Prisoners who, after having succeeded in escaping, are again made prisoners, shall not be subject to any punishment for the previous escape.

ARTICLE 9.

Every prisoner of war shall be obliged to declare his real name and grade if asked, and if he should violate this rule he shall become liable to a restriction of the advantages accorded prisoners of war of his category.

ARTICLE 10.

Prisoners of war may be released on parole if the laws of their own country so permit them, in which case they shall be obliged, on their personal honor, to fulfill scrupulously the engagements they have contracted, both with respect to their own government and the government which has taken them prisoners.

In this case their government shall be obliged to neither require nor accept any service from them which is contrary to their pledged word.

ARTICLE 11.

A prisoner of war cannot be compelled to accept his liberty on parole; neither shall the hostile government be obliged to grant the request of a prisoner who demands his release on parole.

ARTICLE 12.

Every prisoner of war released on parole and recaptured bearing arms against the government to which he had pledged his honor, or against its allies, shall forfeit the right to treatment as a prisoner of war and may be arraigned before the courts.

ARTICLE 13.

Persons who follow an army without being directly connected therewith, such as newspaper correspondents and reporters, sutlers, and furnishers of supplies, who fall into the hands of the enemy, and whom the latter deems it necessary to hold, shall be entitled to treatment as prisoners of war, provided they possess a certificate of identity from the military authority of the army which they were accompanying.

ARTICLE 14.

A bureau of information regarding prisoners of war shall be established in each of the belligerent nations upon the beginning of hostilities, as well as in any neutral countries which may have taken belligerents on their territory. This bureau shall answer all inquiries made concerning the prisoners, and shall receive from the various competent authorities all data regarding internments, transfers, releases on parole, exchanges, escapes, entries into hospitals, deaths, and other information necessary in order to prepare and keep up to date an individual descriptive card for each prisoner of war. The bureau should keep on this card the regimental number, name, age, place of residence, grade, regiment, wounds, date and place of capture, date of internment, of wounds, and of death, as well as all special remarks. Upon the conclusion of peace the descriptive card shall be delivered to the government of the other belligerent.

It shall also be the duty of the information bureau to gather and keep together all articles of personal use, valuable papers, letters, etc., which are found on the fields of battle or left behind by prisoners released on parole, exchanged, or escaping, or dying in hospitals or ambulances, and to transmit them to the interested parties.

ARTICLE 15.

Societies for the relief of prisoners of war, regularly organized under the laws of their country for the purpose of acting as intermediaries in the dispensation of charity, shall, as well as thei

duly authorized agents, be accorded every facility consistent with military necessities and administrative rules in order to carry out effectively their mission of humanity. The agents of these societies may be permitted to distribute relief at internment depots as well as at the halting places of prisoners returned to their country, upon obtaining a personal permit issued by the military authority, and upon pledging themselves in writing to submit to all the measures for the maintenance of order and safety which the latter may prescribe.

ARTICLE 16.

The information bureaus shall enjoy the franking privilege. Letters, drafts, and postal money orders, as well as parcels-post addressed to prisoners of war or mailed by them, shall be exempt from any postage, both in the countries of origin and destination, and in the intermediate countries.

Donations and relief in kind intended for prisoners of war shall be admitted free from all import and other duties, as well as from charges for transportation on railroads operated by the government.

ARTICLE 17.

Officers who become prisoners shall receive the pay to which officers of the same grade are entitled in the country where they are being detained, the amount to be repaid by their government.

ARTICLE 18.

Prisoners of war shall be allowed perfect freedom in the exercise of their religious worship, including the right to attend the services of their creed, provided only that they conform to the measures prescribed by the military authorities for the maintenance of order and safety.

ARTICLE 19.

The wills of prisoners of war shall be received or drawn up in the same manner as those of soldiers of the national army.

The same rules shall be followed with regard to certificates of death and the burial of prisoners of war, taking into account their grade and rank.

ARTICLE 20.

After the conclusion of peace, the prisoners of war shall be sent back to their country as soon as possible.

CHAPTER III.—*Sick and Wounded.*

ARTICLE 21.

The obligations of the belligerents regarding the care of the sick and wounded shall be governed by the Geneva Convention.

SECTION II.—HOSTILITIES.

CHAPTER I.—*The means of injuring the enemy, sieges and bombardments.*

ARTICLE 22.

Belligerents have not an unlimited right in the choice of means of injuring the enemy.

ARTICLE 23.

Besides the prohibitions established by special conventions, it is particularly forbidden:

- a. To use poison or poisoned weapons.
 - b. To kill or wound through treachery persons belonging to the hostile nation or army.
 - c. To kill or wound an enemy who, having laid down his arms or having no longer any means of defense, has surrendered at discretion.
 - d. To declare that no quarter will be given.
 - e. To employ weapons, projectiles, or substances of such a nature as to cause unnecessary pain.
 - f. To make improper use of the flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as of the distinctive signs of the Geneva Convention.
 - g. To destroy or seize property belonging to the enemy, except where such destruction or seizure is imperiously demanded by the necessities of the war.
 - h. To declare extinguished, suspended, or barred the rights and choses in action of the nationals of the adversary.
- A belligerent is also prohibited from compelling the nationals of the adversary to take part in military operations against their country, even in case they were in his service before the commencement of the war.

ARTICLE 24.

Stratagems and the employment of the necessary means to obtain information concerning the enemy and the topography of the country are considered permissible.

ARTICLE 25.

It is forbidden to attack or bombard undefended cities, villages, dwellings, or buildings, whatever be the means employed.

ARTICLE 26.

The commander of the attacking forces shall, before commencing bombardment, do everything in his power to warn the authorities, except in case of an attack by main force.

ARTICLE 27.

During sieges and bombardments all necessary measures should be taken to spare, as far as possible, buildings devoted to religious worship, arts, science, and charity, historical monuments, hospitals, and places of assembly of sick and wounded, provided they be not used at the same time for a military purpose.

It shall be the duty of the besieged to designate these buildings or places of assembly by special visible signs which shall be made known beforehand to the besieger.

ARTICLE 28.

The giving up of a city or place to plunder, even when taken by assault, is prohibited.

CHAPTER II.—*Spies.*

ARTICLE 29.

No person shall be considered as a spy except such as, acting clandestinely or under a false pretext, obtains or seeks to obtain information within the zone of operations of a belligerent with the intention of communicating them to the adversary.

Therefore, undisguised soldiers who have entered the zone of operations of the hostile army for the purpose of obtaining information shall not be considered as spies. Neither shall soldiers or civilians openly performing their duties and engaged in the transmission of dispatches, either to their own or the hostile army, be so considered. This applies equally to individuals sent in balloons for the purpose of transmitting dispatches, and the general keeping up of communications between the different parts of an army or territory.

ARTICLE 30.

A spy caught in the act shall not be punished without first having a trial.

ARTICLE 31.

A spy who, having rejoined the army to which he belongs, is captured later on by the enemy, shall be treated as a prisoner of war and shall incur no responsibility for his previous acts as a spy.

CHAPTER III.—*Envoys bearing flags of truce.*

ARTICLE 32.

A person authorized by one of the belligerents to enter into negotiations with the other and appearing with a white flag shall be considered as an envoy. He, as well as the trumpeter, bugler, or drummer, the flag-bearer, and interpreter accompanying him, shall be held inviolable.

ARTICLE 33.

A military commander to whom an envoy is sent is not obliged to receive him under all circumstances.

He may take all measures necessary in order to prevent the envoy from taking advantage of his mission for the purpose of gaining information.

In case of abuse, he has a right to detain the envoy temporarily.

ARTICLE 34.

The envoy shall lose his rights to inviolability if it is positively and irrefutably proven that he has availed himself of his privileged position in order to provoke or commit an act of treason.

CHAPTER IV.—*Capitulations.*

ARTICLE 35.

Capitulations made between the contracting parties must take into account the rules of military honor.

Once agreed upon, they should be scrupulously observed by both parties.

CHAPTER V.—*Armistices.*

ARTICLE 36.

An armistice suspends military operations by mutual agreement of the belligerent parties. If the duration thereof is not fixed, the belligerent parties may resume operations at any time provided, however, that the enemy is opportunely notified in accordance with the conditions of the armistice.

ARTICLE 37.

The armistice may be general or local. The former suspends warlike operations between the belligerent nations everywhere; the latter only between certain parts of the belligerent armies and within a certain district.

ARTICLE 38.

The armistice should be made known officially and in due time to the proper authorities and to the troops. Hostilities are immediately suspended after the notification or at the appointed time.

ARTICLE 39.

The contracting parties shall determine in the clauses of the armistice the relations which shall take place with the inhabitants and between themselves about the seat of war.

ARTICLE 40.

Any serious violation of the armistice by either party shall give the other a right to denounce it and even to resume hostilities at once in urgent cases.

ARTICLE 41.

A violation of the clauses of the armistice by individuals acting on their own initiative shall only give a right to demand the punishment of the guilty persons and an indemnity for the losses sustained, if any there be.

SECTION III.—MILITARY AUTHORITY UPON THE TERRITORY OF THE ENEMY.

ARTICLE 42.

A territory is considered as being occupied when it is actually under the authority of the hostile army.

The occupation extends only to the regions where this authority is established and capable of being asserted.

ARTICLE 43.

When the legally constituted authority has actually passed into the hands of the occupant, the latter shall take all measures within his power to restore and, as far as possible, to insure public order and life, respecting the laws in force in the country unless absolutely prevented.

ARTICLE 44.

A belligerent is forbidden to compel the inhabitants of an occupied territory to furnish information concerning the army of the other belligerent or concerning his means of defense.

ARTICLE 45.

Compelling the people of an occupied territory to take an oath of allegiance to a hostile power is prohibited.

ARTICLE 46.

The honor and the rights of the family, the life of individuals, and private property, as well as religious convictions and religious worship, should be respected.

Private property shall not be confiscated.

ARTICLE 47.

Looting is positively forbidden.

ARTICLE 48.

If the taxes, duties, and tolls established for the benefit of the nation are collected by the occupant within the occupied territory, it shall be done as far as possible in accordance with the rules of assessment and distribution in force, the occupant incurring the obligation to defray the expenses of administration of the occupied territory to the extent to which the legal government was obliged to do so.

ARTICLE 49.

If, besides the taxes referred to in the foregoing paragraph, the occupant collects other contributions in money in the occupied territory, it shall only be for the needs of the army or of the administration of said territory.

ARTICLE 50.

No public penalty, pecuniary or otherwise, shall be pronounced against the inhabitants on account of individual acts for which they cannot be considered as collectively responsible.

ARTICLE 51.

No tax shall be collected except by virtue of a written order and under the responsibility of a commander-in-chief.

As far as possible the taxes shall be collected in accordance with the rules of assessment and distribution in force.

A receipt shall be given the taxpayers for every tax paid.

ARTICLE 52.

Requisitions in kind and services can only be levied on communes and inhabitants for the needs of the army of occupation. They shall be in accordance with the resources of the country and of such a character as not to oblige the inhabitants to take part in the war operations against their country.

These requisitions and services shall be levied only by authority of the commander in the locality occupied.

Supplies furnished in kind shall be paid for in cash as far as possible, otherwise a receipt shall be given therefor and the amounts due paid as soon as possible.

ARTICLE 53.

An army occupying a territory may seize only the specie, funds, and collectible securities which are actually the property of the state, depots of arms, means of transportation, stores, and provisions, and, in general, all movable property of the government capable of being used in the military operations.

All means used on land, sea, or in the air for the transmission of information or the transportation of passengers or freight, except where governed by maritime law, stores of arms, and, in general, all kinds of munitions of war, may be seized even if they belong to private parties, but they must be restored and the indemnities shall be fixed upon the conclusion of peace.

ARTICLE 54.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in case of absolute necessity. They must also be restored and the indemnities adjusted upon the conclusion of peace.

ARTICLE 55.

The occupying nation shall consider itself merely as the administrator and usufructuary of the public buildings, real estate, forests, and farms belonging to the hostile government and situated within the occupied territory. It shall protect this property and administer it in accordance with the rules governing usufructs.

ARTICLE 56.

The property of communes, of institutions devoted to religious worship, charity, and instruction, or to arts and sciences, even when belonging to the government, shall be treated as private property.

Any seizure, destruction, or intentional injury of such institutions, or of historical monuments, or works of art or science is prohibited and should be prosecuted.

APPENDIX III.

CONVENTION FOR THE ADAPTATION OF THE PRINCIPLES
OF THE GENEVA CONVENTION TO MARITIME WAR-
FARE.

His Majesty, the Emperor of Germany, King of Prussia; etc.,
etc.:

Animated alike by the desire to diminish, as far as depends on them, the inevitable evils of war; and wishing with this object to adapt to maritime warfare the principles of the Geneva Convention of July 6, 1906, have resolved to conclude a convention for the purpose of revising the convention of July 29, 1899, relative to this question, and have appointed the following as their plenipotentiaries:

[Names of plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

ARTICLE 1.

Military hospital ships, that is to say, ships constructed or assigned by states specially and solely for the purpose of assisting the wounded, sick, or shipwrecked, the names of which shall have

been communicated to the belligerent powers at the beginning or during the course of hostilities, and in any case before they are employed, shall be respected and cannot be captured while hostilities last.

These ships, moreover, are not on the same footing as men-of-war as regards their stay in a neutral port.

ARTICLE 2.

Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized relief societies, shall likewise be respected and exempt from capture, provided the belligerent power to whom they belong has given them an official commission and has notified their names to the hostile power at the commencement of or during hostilities, and in any case before they are employed.

These ships should be furnished with a certificate from the competent authorities, declaring that they had been under their control while fitting out and on final departure.

ARTICLE 3.

Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture, on condition that they shall have placed themselves under the direction of one of the belligerents, with the previous assent of their own government and with the authorization of the belligerent himself, and that the said belligerent shall have notified their names to the belligerent powers at the commencement of or during hostilities, and in any case before they are employed.

ARTICLE 4.

The ships mentioned in Articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents independently of their nationality.

The governments agree not to use these ships for any military purpose.

These ships must not in any way hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and visit them; they can refuse their co-operation, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.

As far as possible the belligerents shall enter on the log of the hospital ships the orders they give them.

ARTICLE 5.

The military hospital ships shall be distinguished by being painted white outside, with a horizontal band of green about a metre and a half in breadth.

The ships mentioned in Articles 2 and 3 shall be distinguished by being painted white outside, with a horizontal band of red about a metre and a half in breadth.

The boats of the ships above mentioned, as well as small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, together with their national flag, the white flag with a red cross provided by the Geneva Convention, and in addition, if under the jurisdiction of a neutral state, by hoisting on the mainmast the national flag of the belligerent under whose direction they have placed themselves.

The hospital ships when detained by the enemy under the provisions of Article 4 shall haul down the national flag of the belligerent to whom they appertain.

The ships and boats above mentioned which wish to be shown, during the night, the consideration which is their due, shall take, with the consent of the belligerent they accompany, the necessary measures in order to make the painting that characterizes them sufficiently apparent.

ARTICLE 6.

The distinctive signs provided for in Article 5 can only be used, in time of peace or in time of war, for the protection or to designate the ships therein mentioned.

ARTICLE 7.

In the case of an encounter on board a war vessel, the infirmaries (i. e., the hospital wards of the ship) shall be respected and saved to as great an extent as possible.

These infirmaries and their material remain subject to the laws of warfare, but cannot be alienated from their use, so long as they are needed by the wounded or sick.

However, the commanding officer who has them in his power has the right to dispose of them, in a case of important military necessity, by previously taking care of the wounded and sick therein.

ARTICLE 8.

The protection due to hospital ships and infirmaries of vessels ceases if they are used to commit acts detrimental to the enemy.

The fact that the personnel of these ships and infirmaries is armed for the maintenance of order and the defense of the wounded and sick, as well as the fact of the presence on board of a wireless telegraphic installation, is not to be considered of a nature to justify the withdrawal of protection.

ARTICLE 9.

The belligerents shall be able to appeal to the charitable zeal of the commanders of merchant vessels, yachts, or neutral vessels to take on board and care for the wounded and sick.

The vessels that shall have answered this appeal, as well as those which shall have spontaneously sheltered the wounded, sick, or shipwrecked, shall be benefited by special protection and certain immunities. In no case shall they be captured for the fact of such a cargo; but, excepting promises that may have been made them, they shall be liable to capture for the violations of neutrality they may have committed.

ARTICLE 10.

The religious, medical, or hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take with them the effects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave when the commander-in-chief considers it possible.

The belligerents must guarantee to the staff that has fallen into their hands the same allowances and the same salary as the staff of the same grades of their own navy.

ARTICLE 11.

The sailors and soldiers who are taken on board, and other persons officially connected with the army or navy, when sick or wounded, to whatever nation they belong, shall be protected and looked after by the captors.

ARTICLE 12.

Every war ship of a belligerent can claim the delivery of the wounded, sick or shipwrecked that are on board military hospital ships, hospital ships of relief societies or of private parties, merchant vessels, yachts and boats, whatever the nationality of these vessels may be.

ARTICLE 13.

If wounded, sick, or shipwrecked persons are sheltered on board a neutral war ship, measures shall be taken to prevent their again taking part in the operations of war.

ARTICLE 14.

The shipwrecked, wounded, or sick of one of the belligerents who fall into the hands of the other are prisoners of war. The captor must decide, according to circumstances, whether it is best to keep them or send them to a port of his own country, to a neutral port, or even to a hostile port. In the last event, prisoners thus delivered up to their country cannot serve as long as the war lasts.

ARTICLE 15.

The shipwrecked, wounded or sick that are landed in a neutral port with the consent of the local authority shall, unless a contrary arrangement exists between the neutral power and the belligerent powers, be guarded by the neutral power in such manner as to prevent their taking part in the operations of war.

The hospital and internment expenses shall be borne by the power to whom the shipwrecked, wounded, or sick belong.

ARTICLE 16.

After each engagement the two belligerent parties shall, in so far as military interests allow them, take measures to search for the shipwrecked, wounded, and sick, to have them protected, as well as the dead, from looting and bad treatment.

They shall watch that the burial, immersion (burial at sea) or cremation of the dead is preceded by a careful examination of their bodies.

ARTICLE 17.

Each belligerent shall send, as soon as possible, to the authorities of its country, navy or army, the identification marks or military badges found on the dead, and the list of names of the wounded or sick taken in charge.

The belligerents shall keep each other reciprocally informed of internments and transfers, as well as of admissions into hospitals and of deaths occurring among the wounded and sick in their power. They shall collect all things of personal use, valuables, letters, etc., that are found on the captured vessels, or left by the wounded or sick dying in hospitals, in order to have them transmitted to the interested parties by the authorities of their country.

ARTICLE 18.

Provisions of the present convention only apply between the contracting powers when the belligerents are all parties to the convention

ARTICLE 19.

The commanders-in-chief of belligerent fleets shall see to the execution of the details of the preceding articles, as well as to unforeseen cases, according to the instructions of their respective governments, and conformably to the general principles of the present convention.

ARTICLE 20.

The signatory powers shall take all necessary measures to instruct their navies, and especially the protected personnel, with regard to the provisions of the present convention and to bring them to the knowledge of the public.

ARTICLE 21.

The signatory powers also pledge themselves to take or to propose to their legislative bodies, in case of insufficiency in their penal laws, the necessary measures to repress, in time of war, individual acts of looting and bad treatment of the wounded and of the navies, and also to punish, as usurpation of military law, the improper use of the distinctive signs designated in article 5 for vessels not protected by the present convention.

They shall communicate to each other, through the intermediary of the Government of the Netherlands, the provisions relative to such repression, five years at the latest after the ratification of the present convention.

ARTICLE 22.

In case of war operations between the land and sea forces of the belligerents, the provisions of the present convention shall only be applicable to the embarked forces.

APPENDIX IV.

DECLARATION OF LONDON.

PRELIMINARY PROVISION.

The signatory powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

CHAPTER I.—*Blockade in time of war.*

ARTICLE 1.

A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

ARTICLE 2.

In accordance with the Declaration of Paris of 1856, a blockade in order to be binding must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.

ARTICLE 3.

The question whether a blockade is effective is a question of fact.

ARTICLE 4.

A blockade is not regarded as raised if the blockading force temporarily withdrawn on account of stress of weather.

ARTICLE 5.

A blockade must be applied impartially to the ships of all nations.

ARTICLE 6.

The commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port.

ARTICLE 7.

In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

ARTICLE 8.

A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

ARTICLE 9.

A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name.

It specifies—

- (1) The date when the blockade begins.
- (2) The geographical limits of the coastline under blockade.
- (3) The period within which neutral vessels may come out.

ARTICLE 10.

If the operations of the blockading power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with Article 9, (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

ARTICLE 11.

A declaration of blockade is notified—

- (1) To neutral powers, by the blockading power by means of a communication addressed to the governments direct, or to their representatives accredited to it;
- (2) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.

ARTICLE 12.

The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.

ARTICLE 13.

The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11.

ARTICLE 14.

The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

ARTICLE 15.

Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time.

ARTICLE 16.

If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour, and the geographical position of the vessel at the time.

If through the negligence of the officer commanding the blockading force no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.

ARTICLE 17.

Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective.

ARTICLE 18.

The blockading forces must not bar access to neutral ports or coasts.

ARTICLE 19.

Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.

ARTICLE 20.

A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

ARTICLE 21.

A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

CHAPTER II.—*Contraband of War.*

ARTICLE 22.

The following articles may, without notice, be treated as contraband of war, under the name of absolute contraband:

- (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
- (2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
- (3) Powder and explosives specially prepared for use in war.
- (4) Gun-mountings, limber boxes, limbers, military wagons, field-forges, and their distinctive component parts.
- (5) Clothing and equipment of a distinctively military character.
- (6) All kinds of harness of a distinctively military character.
- (7) Saddle, draught, and pack animals suitable for use in war.
- (8) Articles of camp equipment, and their distinctive component parts.
- (9) Armor plates.
- (10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

ARTICLE 23.

Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

Such notification must be addressed to the governments of other powers, or to their representatives accredited to the power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral powers.

ARTICLE 24.

The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband:—

- (1) Foodstuffs.
- (2) Forage and grain, suitable for feeding animals.
- (3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
- (4) Gold and silver in coin or bullion; paper money.
- (5) Vehicles of all kinds available for use in war, and their component parts.
- (6) Vessels, craft and boats of all kinds; floating docks, parts of docks, and their component parts.
- (7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs and telephones.
- (8) Balloons and flying machines, and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.
- (9) Fuel; lubricants.
- (10) Powder and explosives not specially prepared for use in war.
- (11) Barbed wire and implements for fixing and cutting the same.
- (12) Horseshoes and shoeing materials.
- (13) Harness and saddlery.
- (14) Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.

ARTICLE 25.

Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

ARTICLE 26.

If a power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

ARTICLE 27.

Articles which are not susceptible of use in war may not be declared contraband of war.

ARTICLE 28.

The following may not be declared contraband of war:—

- (1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.
- (2) Oil seeds and nuts; copra.
- (3) Rubber, resins, gums and lacs; hops.
- (4) Raw hides and horns, bones and ivory.
- (5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
- (6) Metallic ores.
- (7) Earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles.
- (8) Chinaware and glass.
- (9) Paper and paper-making materials.
- (10) Soap, paint and colors, including articles exclusively used in their manufacture, and varnish.
- (11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
- (12) Agricultural, mining, textile and printing machinery.
- (13) Precious and semi-precious stones, pearls, mother-of-pearl and coral.
- (14) Clocks and watches, other than chronometers.
- (15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs and bristles.

(17) Articles of household furniture and decoration; office furniture and requisites.

ARTICLE 29.

Likewise the following may not be treated as contraband of war:

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

ARTICLE 30.

Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.

ARTICLE 31.

Proof of the destination specified in Article 30 is complete in the following cases:

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

ARTICLE 32.

Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

ARTICLE 33.

Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circum-

stances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

ARTICLE 34.

The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this article may be rebutted.

ARTICLE 35.

Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

ARTICLE 36.

Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no sea-board.

ARTICLE 37.

A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

ARTICLE 38.

A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

ARTICLE 39.

Contraband goods are liable to condemnation.

ARTICLE 40.

A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo.

ARTICLE 41.

If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.

ARTICLE 42.

Goods which belong to the owner of the contraband, and are on board the same vessel are liable to condemnation.

ARTICLE 43.

If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

ARTICLE 44.

A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship.

The delivery of the contraband must be entered by the captor on the logbook of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

CHAPTER III.—*Unneutral Service.*

ARTICLE 45.

A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

(2) If, to the knowledge of either the owner, the charterer or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the power to which such port belongs, provided that such notification was made in sufficient time.

ARTICLE 46.

A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:—

- (1) If she takes a direct part in the hostilities.
- (2) If she is under the orders or control of an agent placed on board by the enemy government.
- (3) If she is in the exclusive employment of the enemy government.
- (4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.

ARTICLE 47.

Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel.

CHAPTER IV.—*Destruction of Neutral Prizes.*

ARTICLE 48.

A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

ARTICLE 49.

As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

ARTICLE 50.

Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

ARTICLE 51.

A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.

ARTICLE 52.

If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

ARTICLE 53.

If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

ARTICLE 54.

The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the logbook of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

CHAPTER V.—*Transfer to a Neutral Flag.*

ARTICLE 55.

The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to

which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

ARTICLE 56.

The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

There, however, is an absolute presumption that a transfer is void—

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel is reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

CHAPTER VI.—*Enemy Character.*

ARTICLE 57.

Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule.

ARTICLE 58.

The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

ARTICLE 59.

In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

ARTICLE 60.

Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

CHAPTER VII.—*Convoy.*

ARTICLE 61.

Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search.

ARTICLE 62.

If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

CHAPTER VIII.—*Resistance to Search.*

ARTICLE 63.

Forcible resistance to the legitimate exercise of the right of stoppage, search and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

CHAPTER IX.—*Compensation.*

ARTICLE 64.

If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

FINAL PROVISIONS.

ARTICLE 65.

The provisions of the present declaration must be treated as a whole, and cannot be separated.

ARTICLE 66.

The signatory powers undertake to insure the mutual observance of the rules contained in the present declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.

ARTICLE 67.

The present declaration shall be ratified as soon as possible. The ratifications shall be deposited in London.

The first deposit of ratifications shall be recorded in a protocol signed by the representatives of the powers taking part therein, and by His Britannic Majesty's Principal Secretary of State for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the British Government, and accompanied by the instrument of ratification.

A duly certified copy of the protocol relating to the first deposit of ratifications, and of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the signatory powers. The said government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

ARTICLE 68.

The present declaration shall take effect, in the case of the powers which were parties to the first deposit of ratifications, sixty days after the date of the protocol recording such deposit, and, in the case of the powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

APPENDIX V.

CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR.

ARTICLE 1.

Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality.

ARTICLE 2.

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden.

ARTICLE 3.

When a ship has been captured in the territorial waters of a neutral power, this power must employ, if the prize is still within

its jurisdiction, the means at its disposal to release the prize, with its officers and crew, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral power, the captor government, on the demand of that power, must liberate the prize with its officers and crew.*

ARTICLE 4.

A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters.

ARTICLE 5.

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

ARTICLE 6.

The supply, in any manner, directly or indirectly, by a neutral power to a belligerent power, of warships, ammunition or war material of any kind whatever is forbidden.

ARTICLE 7.

A neutral power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of use to an army or fleet.

ARTICLE 8.

A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction

* The United States adheres to Article 3, with the understanding that its last clause implies the duty of neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.

of any vessel intended to cruise, or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war.

ARTICLE 9.

A neutral power must apply equally to the two belligerents the conditions, restrictions or prohibitions made by it in regard to the admission into its ports, roadsteads or territorial waters, of belligerent warships or of their prizes.

Furthermore, a neutral power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

ARTICLE 10.

The neutrality of a power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents.

ARTICLE 11.

A neutral power may allow belligerent warships to employ its licensed pilots.

ARTICLE 12.

In the absence of special provisions to the contrary in the legislation of a neutral power, belligerent warships are not permitted to remain in the ports, roadsteads or territorial waters of the said power for more than twenty-four hours, except in the cases covered by the present convention.

ARTICLE 13.

If a power which has been informed of the outbreak of hostilities learns that a belligerent warship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.

ARTICLE 14.

A belligerent warship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters do not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes.

ARTICLE 15.

In the absence of special provisions to the contrary in the legislation of a neutral power, the maximum number of warships belonging to a belligerent which may be in one of the ports or roadsteads of that power simultaneously shall be three.

ARTICLE 16.

When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent warship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

ARTICLE 17.

In neutral ports and roadsteads belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The authorities of the neutral power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

ARTICLE 18.

Belligerent warships may not make use of neutral ports, roadsteads or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

ARTICLE 19.

Belligerent warships may only revictual in neutral ports or roadsteads to complete their supplies up to amount usual in time of peace.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port of their country. They may, however, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

ARTICLE 20.

Belligerent warships which have shipped fuel in a port belonging to a neutral power may not within the succeeding three months replenish their supply in a port of the same power.

ARTICLE 21.

A prize may only be brought into neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

ARTICLE 22.

A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

ARTICLE 23.

[A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.*]

* This article is excluded from the convention so far as the United States is concerned.

ARTICLE 24.

If, notwithstanding the notification of the neutral power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

ARTICLE 25.

A neutral power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

ARTICLE 26.

The exercise by a neutral power of the rights laid down in the present convention can under no circumstances be considered as an unfriendly act by either of the belligerents who have accepted the articles relating thereto.

ARTICLE 27.

The contracting powers shall communicate to each other in due course all laws, proclamations and other enactments regulating in their respective countries the status of belligerent warships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that government to the other contracting powers.

ARTICLE 28.

The provisions of the present convention do not apply except to the contracting powers, and then only if all the belligerents are parties to the convention.

ARTICLE 29.

The present convention shall be ratified as soon as possible.
The ratifications shall be deposited at The Hague.

APPENDIX VI.

DOCUMENTS AND PAPERS CARRIED BY VESSELS OF THE
UNITED STATES.

Evidence of nationality:

Permanent register for vessels engaged in foreign trade.
(Granted by collectors to vessels of their districts.)

Temporary register for vessels engaged in foreign trade.
(Granted by collectors to vessels not of their districts.)
(See Forms (Catalogue No. 1265), p. 18, Customs Regulations, 1908.)

Permanent enrollment for vessels engaged in coasting trade.
(Granted as above.)

Temporary enrollment for vessels engaged in coasting trade.
(Granted as above.) (See Forms (Catalogue No. 1271), p. 27, Customs Regulations.)

Permanent license for vessels engaged in coasting trade or fisheries. (Granted as above.)

Temporary license for vessels engaged in coasting trade or fisheries. (Granted as above.)

Licenses to yachts.

Commissions to licensed yachts for cruising abroad.

Other papers that may be used as evidence of nationality:

Shipping articles. (See Customs Regulations, p. 86.)

Crew list. (See Customs Regulations, pp. 73, 85.)

Evidence of nationality of foreign-built vessels owned by citizens of the United States entitled to carry the flag and to legal protection, but not documented vessels of the United States:
Certificate of ownership, and also as to the validity and filing of the bill of sale. (Issued by the collector of port or United States consul.)

Other papers carried:

Permit for fishing vessel to touch or trade at a foreign place.
(See Customs Regulations, p. 91.)

Passenger list.

Manifest of cargo, foreign or coasting. (See Customs Regulations, pp. 69, 85, 89, 93.)

Clearance. (See Customs Regulations, pp. 85, 89, 90.)

Bills of lading.

Ship's log-book.

Bill of health.

Commercial intercourse with the guano islands under the jurisdiction of the United States is a part of the coasting trade. Vessels engaged in this guano trade are not required to produce clearances or certified manifests.

The net tonnage of a vessel, besides being shown upon her certificate of registry, etc., is marked upon the face of the beam under the forward side of the main hatch of sea-going vessels.

APPENDIX VII.

NEUTRALITY—GERMANY AND GREAT BRITAIN.

A PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

Whereas a state of war unhappily exists between Germany and Great Britain; And Whereas the United States is on terms of friendship and amity with the contending powers and with the persons inhabiting their several dominions;

And Whereas there are citizens of the United States residing within the territories or dominions of each of the said belligerents and carrying on commerce, trade, or other business or pursuits therein;

And Whereas there are subjects of each of the said belligerents residing within the territory or jurisdiction of the United States and carrying on commerce, trade, or other business or pursuits therein;

And Whereas the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And Whereas it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, in order to preserve the neutrality of the United States and of its citizens and of persons within its territory and jurisdiction, and to enforce its laws and treaties, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from any violation of the same, do hereby declare and proclaim that by certain provisions of the act approved on the 4th day of March, A. D. 1909, commonly known as the "Penal Code of the United States," the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to-wit:

"1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

"2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

"5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

"6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

"7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

" 8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

" 9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

" 10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

" 11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents."

And I do hereby further declare and proclaim that any frequenting and use of the waters within the territorial jurisdiction of the United States by the armed vessels of a belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations, or as posts of observation upon the ships of war or privateers or merchant vessels of a belligerent lying within or being about to enter the jurisdiction of the United States, must be regarded as unfriendly and offensive, and in violation of that neutrality which it is the determination of this government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided, I further proclaim and declare that from and after the sixth day of August instant, and during the continuance of the present hostilities, no ship of war or privateer of any belligerent shall be permitted to make use of any port, harbor, roadstead, or waters subject to the jurisdiction of the United States from which a vessel of an opposing belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-

mentioned vessel beyond the jurisdiction of the United States. . . any ship of war or privateer of a belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in any of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed, unless within such twenty-four hours a vessel, whether ship of war, privateer, or merchant ship of an opposing belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war, privateer, or merchant ship of an opposing belligerent which may have previously quit the same port, harbor, roadstead, or waters. No ship of war or privateer of a belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of an opposing belligerent. But if there be several vessels of opposing belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the opposing belligerents, and to cause the least detention consistent with the objects of this proclamation. No ship of war or privateer of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry

h vessel, if without any sail power, to the nearest port of her country; or in case the vessel is rigged to go under sail, and y also be propelled by steam-power, then with half the quantity coal which she would be entitled to receive, if dependent upon am alone, and no coal shall be again supplied to any such ship war or privateer in the same or any other port, harbor, road-head, or waters of the United States, without special permission, til after the expiration of three months from the time when ch coal may have been last supplied to her within the waters the United States, unless such ship of war or privateer shall, nce last thus supplied, have entered a port of the government to hich she belongs.

And I do further declare and proclaim that the statutes and the reaties of the United States and the law of nations alike require hat no person, within the territory and jurisdiction of the United States, shall take part, directly or indirectly, in the said war, out shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

And I do hereby enjoin all citizens of the United States, and all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes or treaties or in violation of the law of nations in that behalf.

And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent cannot lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war," yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained during the said war without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

And I do hereby give notice that all citizens of the United States and others who may claim the protection of this government, who may misconduct themselves in the premises, will do so at their peril, and that they can in nowise obtain any protection from the Government of the United States against the consequences of their misconduct.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of August, in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States of America the one hundred and thirty-ninth.

WOODBOW WILSON.

By the President:

WILLIAM JENNINGS BRYAN,
Secretary of State.

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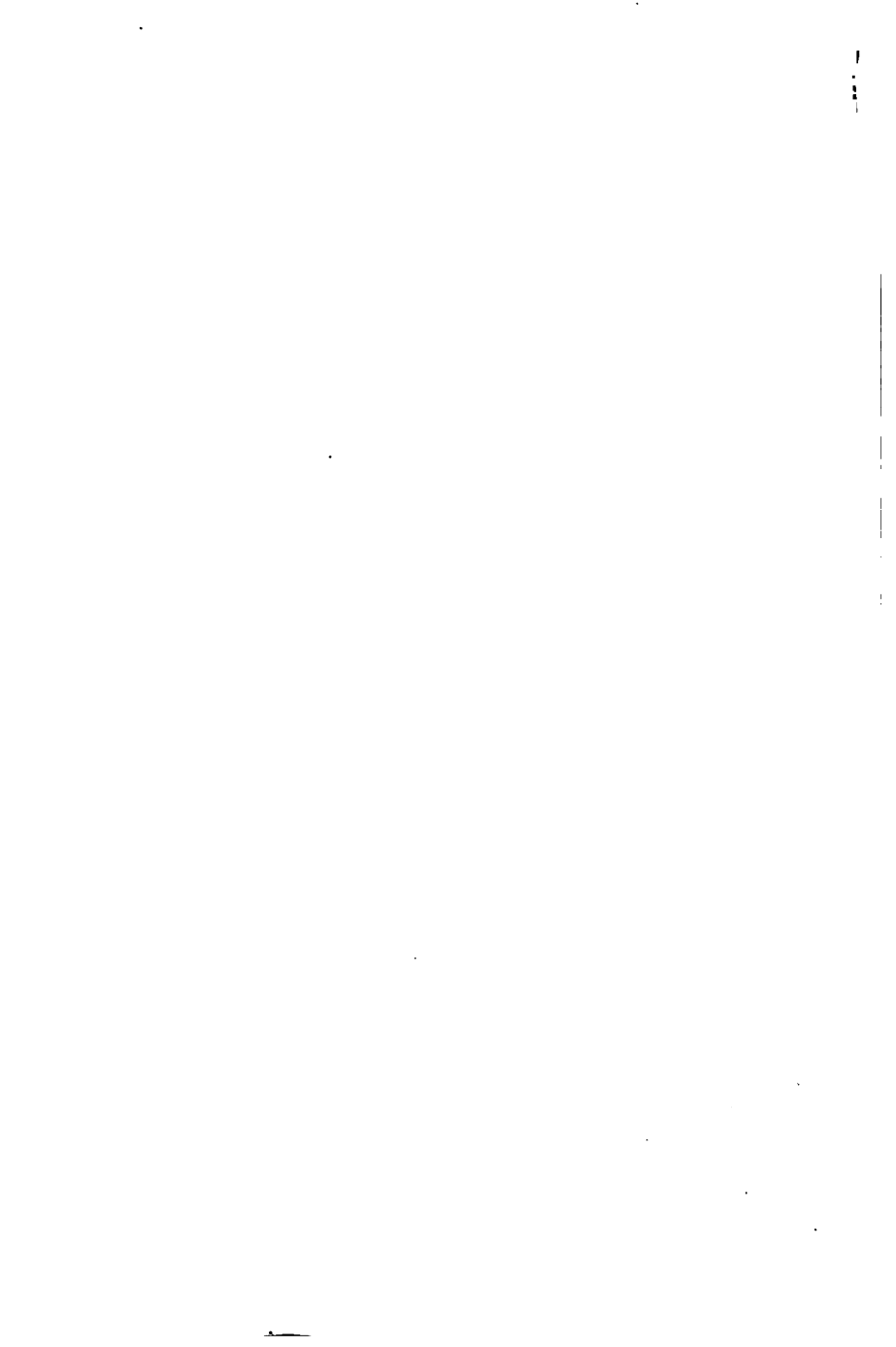
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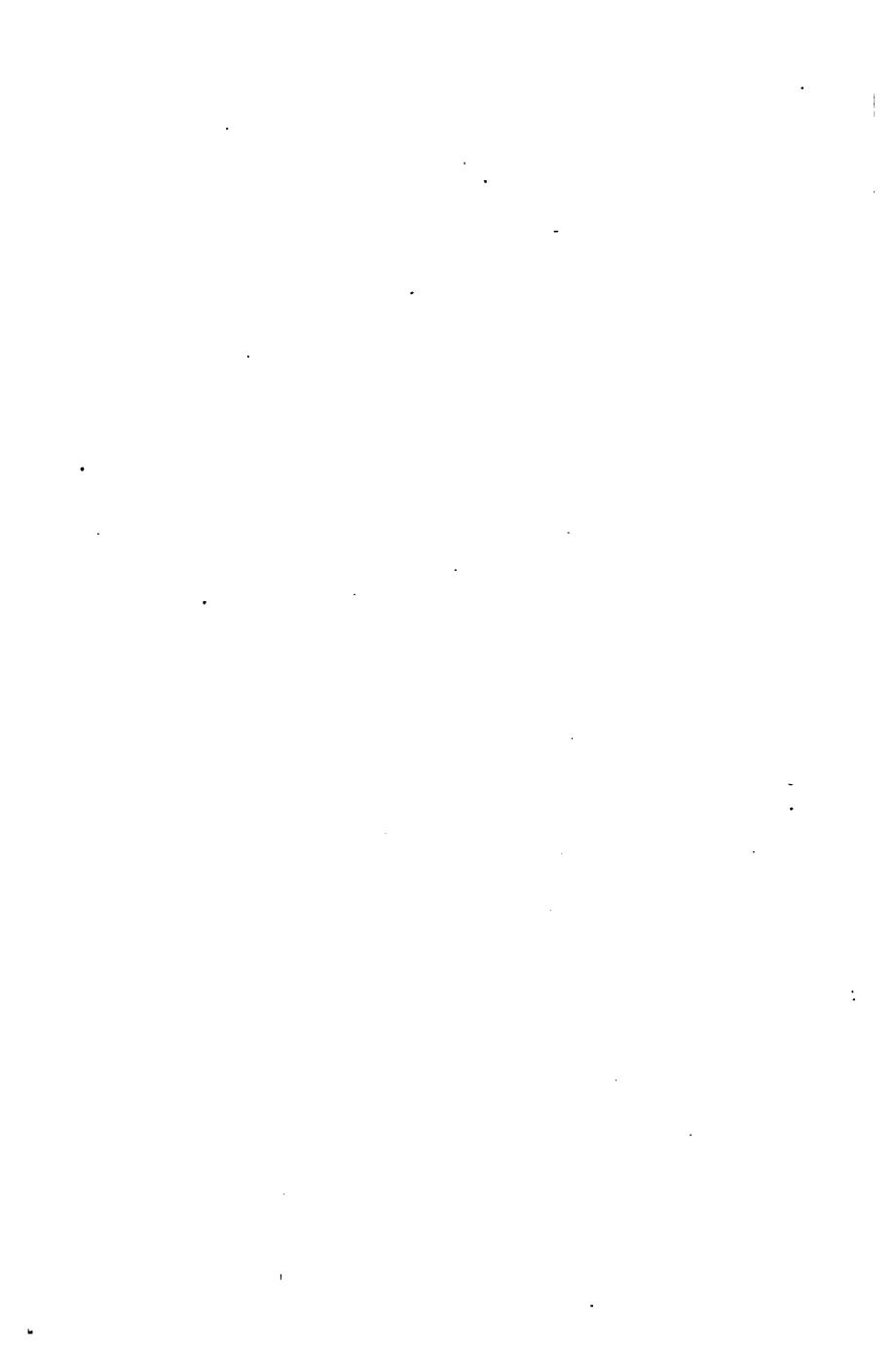
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